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No. 05-1508

Supreme Court, U.S.
FILED
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# In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO. 1

*Petitioners*,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

*Respondents*,

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## JOINT APPENDIX

PAUL D. CLEMENT
*Counsel of Record*
SOLICITOR GENERAL
UNITED STATES DEPT. OF JUSTICE
950 PENNSYLVANIA AVE., N.W.
ROOM 5614
WASHINGTON, DC 20530-0001
(202) 514-2217
*Counsel for Respondents Department of Education, et al.*

RONALD J. VANAMBERG
*Counsel of Record*
C. BRYANT ROGERS
VANAMBERG, ROGERS, YEPA & ABEITA, LLP
POST OFFICE BOX 1447
SANTA FE, NM 87504-1447
(505) 988-8979
*Counsel for Petitioner Zuni Public School District No. 89*

LEIGH MARC MANASEVIT
*Counsel of Record*
BRUSTEIN & MANASEVIT
3105 S. STREET, N.W.
Washington, DC 20007
(202) 965-3652
*Counsel for Respondent New Mexico Pub. Ed. Dept.*

GEORGE W. KOZELISKI
POST OFFICE BOX 478
GALLUP, NM 87305-0478
(505) 863-9339
*Counsel for Petitioner Gallup-McKinley County Public School District No. 1*

Petition for Certiorari Filed May 24, 2006
Petition for Certiorari Granted September 26, 2006

## TABLE OF CONTENTS

Relevant Docket Entries . . . . . JA 1

Declaration of Richard G. Salmon . . . . . JA 4

U.S. Department of Education Hearing Transcript
Dated October 4, 2000 . . . . . JA 8

Exhibit A Judge O'Brien's Dissent
Impact Aid Disparity for 1999-2000 . . . . . JA 85

New Mexico State Department of Education
Impact Aid Disparity for 1999-2000 . . . . . JA 89

5 U.S.C. § 553 . . . . . JA 93

# RELEVANT DOCKET ENTRIES

## U.S. COURT OF APPEALS
## FOR THE 10th CIRCUIT

## 01-9541

11/16/01 [1464347] Petition for review filed. Original 5 copies. c/s: y. Copy of petition served on party at address shown in 11/16/01 letter. Fee pd: chk.#: #34007 rcpt #: #10435 amt:$ $100.00. DATE RECEIVED: 11/16/01. Docketing statement due 12/3/01 for Gallup-McKinley, for Zuni Public School. Agency record due 12/26/01 for Gallup-McKinley, for Zuni Public School. Notice of appearance due 11/29/01 for EDUC, for Gallup-McKinley, for Zuni Public School. (kjs)

12/30/04 [1768854] Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Seymour, authoring judge; Henry; O'Brien, dissenting. [01-9541] Parties served by mail on 12/30/04. (oac)

01/13/05 [1772238] Petition for rehearing in banc filed by Zuni Public School and Gallup-McKinley. Original and 19 copies. c/s: y. (lg)

01/13/05 [1772239] Document [1772238-1] Petition for rehearing en banc filed by Petitioners' Zuni Public School and Gallup-McKinley submitted to panel. (lg)

02/23/06 [1891495] Terminated on the Merits after Oral Hearing; Enforced/Affirmed; The panel decision is vacated. Written, Signed, Published. Heard en banc; Seymour; Ebel; Kelly; Henry; Briscoe; Lucero; Murphy; O'Brien; McConnell; Tymkovich. [01-9541] Parties served by mail on 2/23/06 (lg)

# LIST OF THE AGENCY RECORD
## IN THE MATTER OF ZUNI PUBLIC SCHOOL DISTRICT #89 AND GALLUP-MCKINLEY PUBLIC SCHOOLS

**(Docket Number 99-81-I)**

1. Letter from Mark W. Smith to Frank J. Furey, Director, Office of Hearings and Appeals (December 17, 1999), requesting appointment of an administrative law judge (ALJ) and enclosing Notice of Certification and Report (October 5, 1999) and hearing requests of Zuni Public Schools (October 25, 1999) and Gallup-McKinley Public Schools (November 8, 1999).

21. Initial Decision with cover letter (April 17, 2001).

22. Zuni Public School District Petition for Review of Administrative Law Judge Decision by the Secretary of the United States Department of Education (May 18, 2001).

23. Gallup-McKinley County Public School District Petition for Review of Administrative Law Judge Decision by the Secretary of the United States Department of Education (May 23, 2001).

25. Decision of the Secretary (October 11, 2001).

**UNITED STATES DEPARTMENT OF EDUCATION**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**Docket No. 99-81-I**
**Impact Aid Proceeding**

| | |
|---|---|
| In the Matter of | ) |
| Zuni Public School District #89 | ) |
| and Gallup-McKinley Public Schools | ) |
| Applicant. | ) |
| | ) |

## DECLARATION OF RICHARD G. SALMON

I, Richard G. Salmon, hereby depose and say as follows:

1. My full name is Richard G. Salmon.

2. Since May 1989, I have been a professor in Educational Administration in the College of Human Resources and Education of the Virginia Polytechnic Institute and State University. My responsibilities include graduate teaching, conducting research and field service in school finance. I have specialized in educational finance equity issues since 1969.

3. My specialization in school finance matters has included numerous assignments as a consultant and appearances as an expert witness in administrative, State and Federal Court proceedings. I have also had published a number of books, book chapters, monographs, journal articles and technical reports. A copy of my Abbreviated Vita is attached to this Declaration.

4. I have been familiar with the disparity standard, also known as the Federal Range Ratio, since its promulgation in 1976. It is essentially the statutory standard now contained in section 8009(b) of the current Impact Aid law.

5. The disparity test in both the former regulations and Section 8009 is a range measure of equity; its focus is the range between the high value in the ranking, set at the 95th percentile of all pupils in the State, and the low value in that ranking set at at the 5th percentile of all pupils in the State. It focuses exclusively on extremes rather than the entire distribution.

6. It is the practice in the field in using tests of this kind to exclude the segments of the student population at the margins of the ranking so as to avoid having their per-pupil input (i.e., expenditure or revenue) falsely overstate disparities. Where the objective is to evaluate whether a funding formula treats similarly situated students similarly, it is appropriate to avoid per-pupil test inputs that erroneously overstate disparities. A reasonable and appropriate corrective measure in a ranking of LEAs by revenues or expenditures per pupil is to exclude the per-pupil inputs of LEAs at the 95th and 5th percentiles of all pupils in the State. When modified in this way, an equity measure of this kind is known as a restricted range measure.

7. The former Appendix to 34 C.F.R. Part 222 restricted the range of the disparity standard in a methodologically sound manner by excluding

LEAs in the ranking that fell above or below the 95th and 5th percentiles of the total number of students in the State. The appendix to the current regulations, Appendix to 34 C.F.R. Part 222, Subpart K, is in accord. A percentile exclusion based on students as the unit of analysis, as specified in these appendices, is a reasonable and effective adjustment under the circumstances.

8. The methods Zuni Public School District # 89 uses with respect to the percentile exclusions are incorrect. Zuni's first calculation simply applies the 5% to the number of LEAs in the State, eighty-nine, to get four or five, and then eliminates five LEAs off the top and bottom of the ranking. Applying the percentiles to the number of LEAs in the State is not applying the percentiles to revenues per pupil nor does it appropriately restrict the range of the disparity test by excluding LEAs from the disparity test.

9. Likewise, Zuni's method of applying percentiles to the revenues per membership of the highest and lowest LEAs in the State and then excluding LEAs with per pupil revenues above or below the product of those calculations is not a proper method of restricting the range of the disparity test.

10. It is characteristics of the students at the margins that may confound disparity test results, not characteristics of revenues or expenditures that may do so. Therefore, it is inappropriate to exclude the top and bottom 5 percentiles of expenditures or revenues per pupil in lieu of

pupils. That method would not prevent the problem of false disparities. To read the statute in the manner suggested by Zuni would be to render the test ineffective to gauge whether a State's program is achieving equity.

11. As measured by the statutory standard in Section 8009, New Mexico has a highly equalized funding formula. Without the ability to consider Impact Aid as an equalized State as provided by law, New Mexico's efforts to equalize expenditures would be seriously hindered by the Impact Aid paid to LEAs in the State.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/_____
Richard G. Salmon

April 25, 2000

STATE OF VIRGINIA
County of Montgomery, to-wit:

Sworn to and subscribed by Richard Salmon before me this 25th day of April, 2000.

Witness my hand and official seal.

/s/_____
Notary Public

My commission expires:
Nov. 30, 2002

**U.S. DEPARTMENT OF EDUCATION**
**OFFICE OF HEARINGS AND APPEALS**
**HEARING**

**No. 99-81-1**

| | |
|---|---|
| In the Matter of: | ) |
| | ) |
| ZUNI PUBLIC SCHOOL DISTRICT #89 | ) |
| and | ) |
| GALLUP-McKINLEY PUBLIC SCHOOLS | ) |
| | ) |

Rio Grande Courtroom
Federal Courthouse
333 Lomas Street, NW
Albuquerque, New Mexico

Wednesday, October 4, 2000

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE: HON. ALLAN C. LEWIS
Chief Administrative Judge

APPEARANCES:

On behalf of the U.S. Department of Education:

MARK W. SMITH, ESQ.
Office of General Counsel
600 Independence Ave., SW
Washington, D.C. 20202-4615

On behalf of the New Mexico Department of Education:

JONATHAN D. TARNOW, ESQ.
Brustein & Manasevit
3105 South Street, NW
Washington, D.C. 20007

On behalf of the Zuni School District:

RONALD J. VanAMBERG, ESQ.
Roth, VanAmberg, Rogers, Ortiz, Fairbanks
& Yepa, LLP
347 East Palace
P.O. Box 1447
Santa Fe, New Mexico 87504-1447

On behalf of the Gallup-McKinley Public Schools:

GEORGE W. KOZELISKI, ESQ.
P.O. Box 478
Gallup, New Mexico 87305

**PROCEEDINGS**

JUDGE LEWIS: On the record, please.

We are here today for an oral argument. Will each of the representatives of the various organizations please identify themselves for the record?

MR. KOZELISKI: George Kozeliski representing Gallup-McKinley County School District.

JUDGE LEWIS: Thank you.

MR. VanAMBERG: Ronald VanAmberg representing the Zuni schools.

JUDGE LEWIS: Correct.

MR. SMITH: Mark Smith representing the assistant secretary.

JUDGE LEWIS: Thank you.

MR. TARNOW: Jonathan Tarnow representing the State of New Mexico Department of Education.

JUDGE LEWIS: Thank you very much.

Essentially in terms of how I would like to run this particular argument is I would first like to address the arguments raised by Zuni, then we will have any additional comments on the Zuni arguments that Mr. Kozeliski -- but Mr. Kozeliski, if you would like to add anything to Zuni's argument you may, and then I will hear from the Department of Education and then lastly from the State of New Mexico.

In addition, thereafter I will provide each of the parties an opportunity to add any additional comments. I do not impose any time limits on the arguments. I feel that this is an opportunity for you to address your issues to me, also an opportunity for myself to clarify any problems that I have, and I want all the parties to have a sense that they have tried to accomplish what they came here to do.

With that in mind, I would look to Mr. VanAmberg, please. If you'll come up to the podium?

MR. VanAMBERG: Yes, Your Honor.

Thank you, Your Honor. I'm Ronald VanAmberg and I represent the Zuni Independent School District on this appeal. The dispute is -- Zuni's main argument or relates to a dispute over what the state can take the impact aid which has been paid by the federal government for the purpose of compensating federally impacted school districts. The legislation which allows for this to take place says the state may take credit for the impact for the impact aid dollars.

However, there are certain requirements that have to be met and that is basically that they can have the money, take credit for the money if they are -- if they have developed and there is an existence a system which equalizes funding for all LEAs within the state.

The congressional requirement under 77809(b)(I) is that there has to be -- the state must equalize expenditures for free public education among local educational agencies, and I believe that this language is important because it sets out what the intent of Congress was when it allowed the states to take advantage of the impact aid dollars, and that is that there has to be equalization between the LEAs. And I think it's this

context and this theme that has to be looked at and considered when analyzing exactly how the formula which I think is at the heart of the Zuni case is developed.

If a state does not have equalized funding within LEAs the federal government does not step in and do anything. It merely says, according to its statutory scheme, that you then don't get the opportunity, State of New Mexico, to take advantage of the impact aid dollars which we believe rightfully belong otherwise to the impacted districts.

Bear in mind that the state is obligated under the New Mexico state constitution to educate its students under a uniform program of education. It's obligated to spend its own money. There is nothing which requires the federal government to come in and assist the state in performing its constitutionally mandated function.

Impact aid for the state is a windfall. It's a privilege, and it has to meet the test that Congress has set up which is basically there has to be equalization among the LEAs. Bear in mind that there are only three states that take advantage of this congressional offer, New Mexico being one of them.

The Zuni's main issue relates to the statutory language concerning how equalization is determined and looking at the language it is our position that one must continually reference the intent of Congress and the function of impact aid dollars. The function of impact aid dollars is to compensate school districts which are federally -- which are impacted by a federal presence.

Boiling this down, it means that the federal government is occupying the area. The federal government cannot be taxed. The federal government's land cannot be taxed, and there is

an inability of districts which have a federal presence to raise money through taxation, and that is generally the impact which the impact aid funds address.

The intent of Congress is to compensate these districts because of the federal presence. It's a fair approach. And the intent is that the money goes to the impacted districts and not to the state. I think it's important to always bear in mind that this is not the state's money that we're fighting over. This is the LEAs money we're fighting over. Congress intended to pay the LEAs and not the state.

And with that in mind I believe you have to look at the language which -- of the statute which relates to how you now develop the field of districts which you then compare in order to determine whether or not there is the 25 percent discrepance between the top district and the bottom district, and this is where the argument lies as to how this leveling off process takes place and how this formula is developed.

As Your Honor knows from the briefs, the state starts reducing students -- student counts. They rank the LEAs and then the state takes off 5 percent of the students from the top, 5 percent from the bottom. They draw the line there and they see if -- where the LEAs fit in that regard. Sometimes they fit in the middle, in which they move the line closer to the middle and lack of prosecution off the LEAs from the top and the LEAs from the bottom accordingly.

We do not believe that that is contemplated or even remotely suggested by the language of the statute. The statute states that you are to disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the state. Breaking this down, one is to disregard the local

educational agencies, not students. Nothing else. Local educational agencies. Thus the focus is on the elimination of LEAs to smooth out the field.

The next question is the criteria used to eliminate the LEAs from the calculation, and the criteria used for this elimination is based upon calculations relating to per pupil expenditures or revenues above the 95th percentile or under the 5th percentile. Thus at this point the statute tells us to look at the LEAs themselves and their relative per pupil expenditures or revenues.

JUDGE LEWIS: The Department says in their view that the statute's ambiguous. Is that your view?

MR. VanAMBERG: I don't think it's -- it may be ambiguous to the precise formula that is to be used. I don't think it is ambiguous as to what is intended and what the component parts are of the formula, and I think if -- and I'll go into this carefully, Your Honor, because I've -- obviously I've given this a lot of thought and my thought on this has been evolving. And I think when you really look closely at the language, you look closely at the intent, I don't think that the ambiguity which the state suggests exists.

JUDGE LEWIS: Okay. So if I understand what you're saying in terms of whether the statute ought to be construed between LEAs and the students, the membership, you would say there's no ambiguity there?

MR. VanAMBERG: Correct.

JUDGE LEWIS: In determining the actual 5 percent and 95 percentiles it sounds as if your view is on that question there may be some ambiguity. Is that correct?

MR. VanAMBERG: I think there may be an argument as to whether there is an ambiguity. I think my position is that there is not.

JUDGE LEWIS: Okay.

MR. VanAMBERG: And I think I'll explain that later. I'm working my way into that.

I do -- I guess what I'm saying is that I see the argument for ambiguity. I do not see the resolution. Let's assume you find an ambiguity in there -- I do not see the resolution of this being to include a formula such as that being utilized by the state as being a reasonable solution to the ambiguity.

JUDGE LEWIS: Okay. But I want you to clarify exactly what you think is ambiguous at some point in your argument.

MR. VanAMBERG: All right. I -- as I say, the focus -- the direction of my argument will be toward trying to convince Your Honor that there is no ambiguity.

JUDGE LEWIS: Okay.

MR. VanAMBERG: And so that will be my direction, but I can understand better the argument that maybe there is an ambiguity because the precise formula is not set out with -- let's say by an example which reflects this, but I don't think that there is one.

I think the reason for this is that the statute tells us to look at the LEAs themselves and the relative per pupil expenditures or revenues. Eliminating LEAs by eliminating students has nothing to do with this requirement. The statute then continues and sets forth the standard against which these

pupil expenditures are measured, which are of such, quote -- or in brackets, per pupil expenditures of the state.

Again, the language I believe is clear that LEAs which are at the bottom 5 percent and the top 5 percent of all LEAs in per pupil expenditures -- and I think that's the clarity of the statute -- the top 5 -- you look at the top 5 and the bottom 5 percent relating to LEAs in per pupil expenditures, and you then eliminate those which are above the line and below the bottom line.

And there are only two -- and if you continue with this analysis there are only two component parts to the calculation. One is the LEAs and the other is the per pupil expenditures.

Now, once you get there I think it's appropriate then to take a look at the context in which this final calculation is developed. This is not a statistical exercise trying to find a statistical average in a wildly disparate field. These are supposed to be LEAs that are providing equal educational opportunities to their students. They're supposed to be equalized under New Mexico constitution, under the requirements of Congress if the state wants the impact aid credit.

And equal educational opportunities generally boils down to funding for student. The field is then further equalized because the states are allowed to remove a number of the idiosyncratic funding that takes place among students -- or LEAs which reflect density, sparsity, size, special education, and other factors, further homogenizing this field.

Then Congress gives the state the generous allowance of a 25 percent disparity between the top district and the bottom district, and we submit that there's no reason why in an

equalized educational setting which New Mexico purports to be that the top funded district should ever exceed the bottom funded district by more than 25 percent. Federal government then gives the state another break, which then allows for this 5 percent discount from the top and the 5 percent discount from the bottom.

Under the formula it requires -- or under the statute it says disregard local educational agencies, et cetera. It contemplates the elimination of LEAs, at least one at the top and one at the bottom. It eliminates those which are above 95 percent and below the 5 percent of quote, such expenditures.

The question is what is -- what do they mean by such expenditures? The only reference to expenditures is per pupil expenditures, and I'm submitting, Your Honor, that the only rational way and literal way to comply with this language is to take the top student expenditures and multiply that by 95 percent, take your lowest student expenditures in your LEAs, multiple that by 105 percent, and you eliminate the LEAs above and you eliminate the LEAs below.

I think that is a precise following of the language of that statute because you are then looking at -- you're eliminating A, LEAs, not students, and B, you are comparing LEAs' funding against the standards set by the highest LEA and by the lowest LEA, and that way you are now bringing the field -- you are compacting the field a little more. You're not knocking off 28 percent of the LEAs which the state -- funding for which the state formula accomplishes.

You are ending up with a situation where you may catch a few LEAs at the top and a few at the bottom, but then you do your comparison with the field which has basically already been equalized, and now there's an adjustment.

JUDGE LEWIS: Isn't percentile some type of statistical language? Don't they use that in statistics? So when I speak of 5 percent and 95 percentile, aren't they generally considering that you set up a scale with the LEA or student at the -- rank them at the bottom then rank them all the way to the top and then go through and add a cut-off line at 5 percent and 95 percent --

MR. VanAMBERG: Well, that's --

JUDGE LEWIS: -- which if I understood was your other argument in terms of how you eliminate the LEAs.

MR. VanAMBERG: That is the only other -- if there is an ambiguity that is the only other method that I can see, Your Honor, which would fit within the language there, and I was going to get to that.

JUDGE LEWIS: But your main argument of the two you feel most comfortable arguing to me the 105 percent-95 percent approach --

MR. VanAMBERG: I do --

JUDGE LEWIS: -- as that which is required by the statute?

MR. VanAMBERG: -- because it relates to a percentage of per pupil expenditures. Ninety-five percent of the per pupil expenditure -- and what this does, it inevitably avoids the situation we have now under the state's formula where when they have eliminated the LEAs from the top and the LEAs from the bottom, I believe it's Moscero -- or Raton at the top and then you knock it all the way down to Moscero and you've got a hundred percent disparity between now the

adjusted top ranked school district and the actual top ranked school district.

So they both -- there's a wide disparity here. There's a wide disequalization of funding now between actually the top ranked and the actual top ranked school district. I think this avoids that and I think Congress understood that this would be avoided by referencing the top expenditure. Then you take the 95 percent and you draw the line there and you compare the LEAs against that.

That in all likelihood would result in a disparity between the top -- the actual top ranked and the adjusted top ranked of maybe 5 percent, 10 percent, something like that, because of the way that line is drawn. And I think that that follows the language, and I think it more reflects the reality of what we are dealing with, which is Congress coming in and saying, Yes, you can have our money, but you need an equalized educational setting between your LEAs, and you're supposed to have that anyhow, according to your constitution.

We're going to allow you to make adjustments to even bring that field closer together, and you can do this final minor adjustment here and then we'll give you a 25 percent disparity allowance.

And I don't think, Your Honor, that -- first of all, the language does not support eliminating 28 percent of the school districts from -- and it doesn't support the kind of disparity that -- or the elimination of the disparity that actually exists in New Mexico by playing with a formula. I believe it's more appropriate to respect not only the language but the intent and purpose of this legislation which is to have a real equalization that exists among the LEAs in the state.

JUDGE LEWIS: Isn't your approach a substantial departure from what existed prior to '95 or '94 when this provision was enacted? In other words, under -- is it your present position under the disparity test much, much different than the disparity test that was in existence from '74 to '94?

MR. VanAMBERG: Well, what I'm trying to do, Your Honor, is read the -- is trying to figure out the language, which I think --

JUDGE LEWIS: No. I understand, but it seems to be a marked difference.

MR. VanAMBERG: It's a difference from the way that the states were doing it at the time, and unless Zuni stepped forward would be different from how they would be doing it today unless it were challenged and they would continue along that line.

JUDGE LEWIS: Okay. But there's nothing in the legislative history if I understand it correctly that indicates that Congress sought to make a marked change in how the disparity tests would operate. Is that fair to say?

MR. VanAMBERG: I don't think there's much -- and I've looked at the legislative history as much as I can -- I don't think there's much in the legislative history to -- which amplifies at all the language which ultimately appears in the statute.

JUDGE LEWIS: Okay. So there's nothing there one way or the other?

MR. VanAMBERG: I couldn't find it, and I --

JUDGE LEWIS: Okay.

MR. VanAMBERG: -- I spent a couple of days looking for it.

Under the state's calculation you've got 100 percent disparity between the top LEA and the adjusted top LEA. You've got a hundred -- if you work the formula as I suggest it should be worked and it doesn't skew anything. It just includes more LEAs. You've got 117 percent disparity between the top adjusted and the bottom adjusted LEA. That's not equal.

And again, I go back that the money, the impact aid money, does not belong to the state. It's something which belongs to the districts which have been federally impacted and this is not, I believe, the kind of equality that Congress has intended by working this kind of formula where you essentially eliminate the true nature of the disparities.

And as I mentioned to the Court -- to Your Honor previously, the only other method that I can see would be the same way that it's worked when students are in school and you ask what percentile are you in and, Well, I'm in the 95th percentile in my class, or I'm in the 50th percentile in my class. And what you do there is you rank the students and then you work your percentage on the students on the top and the students on the bottom and you find out who's in the 95th percentile and who's in the 5th percentile.

And that I think is also -- although I don't think it's as pure and accurate, I think it's -- if there in an ambiguity I think that's the only other way that this formula could be worked, and I -- which would be to rank the LEAs and then by -- in accordance with their relative per pupil expenditures

and then you eliminate the top 5 percent. You eliminate the bottom 5 percent, and then you work your figure, which we have discussed in our briefs.

If there is an ambiguity I believe that the two ways that I have suggested are the only two ways which make sense and which respect the language of the statute. If there is an ambiguity I do not think it is then justified for the State of New Mexico or the Department of Education to then say that they have carte blanche to come up with whatever formula they wish and then work a -- come up with a formula which creates -- which masks a true disparity in this state between equalization and which finds absolutely no support in the statute which was enacted by Congress.

JUDGE LEWIS: Let me ask you something. Would you agree that there's an obvious difference between how the disparity test is computed under the regulations in the appendix in the statute?

MR. VanAMBERG: Yes.

JUDGE LEWIS: Okay. And so there is an -- the reg is in effect in conflict with the statute?

MR. VanAMBERG: That's our position.

JUDGE LEWIS: Okay. Now, there's a point that the department touched on, and unfortunately they did it in their reply brief, and this has to do with the question of whether I have the power to declare a regulation invalid. It was only addressed in a very short-shrift fashion by the department. You haven't had an opportunity to respond to that.

I would like to give you an opportunity as well as any of the other parties here an opportunity to file a supplemental memo if you would like, and you can take for my consideration here three weeks to file it.

But let me say this, that the power to invalidate a regulation as I understand it stems from one of two means. You either have to have the inherent authority to invalidate the regulation, and I understand that to mean essentially that it goes to our Article 3 type judge, a judge that has a lifetime tenure and whose salary cannot be diminished. Unfortunately, I don't fall in either one of those categories, especially the salary part.

The other source of authority to invalidate a regulation is one that's been specifically granted by statute, and there have been occasions in which an administrative body in effect has been granted that authority. Presently I don't think I have that authority. If you can find something which states or which shows that I do, I'm open to consider it.

Let me first start you out and point you to an opinion I issued, and it's called the Lemont Township. It was an impact aid case -- you actually can -- we have a website which has our decisions on it. It's called www.ed-oha.org.

MR. VanAMBERG: Are these dashes or dots?

JUDGE LEWIS: It's www.ed-oha. --

MR. VanAMBERG: dot org.

JUDGE LEWIS: - dot org.

MR. VanAMBERG: Okay.

JUDGE LEWIS: I wrote that in '92 and it was affirmed by Secretary on May 4 of '92. The secretary's affirmance is not at that website, but he really didn't add much beyond what I said there. That might be a point for you to start.

MR. VanAMBERG: Okay.

JUDGE LEWIS: But the short of it is is that I sit as an administrative law judge and hear this case under the Administrative Procedures Act. Then one of the provisions in there says that essentially I issue my decision subject to the published rules of the agency, and in Lemont I interpreted that to mean the regulations of the agency.

And so if there was a conflict between the regulation and the statute, I felt essentially that there was nothing I could do about it, that I had to go under the regulation and that your remedy lies going to federal court on such an issue.

Okay?

MR. VanAMBERG: I will take a look at that, Your Honor.

JUDGE LEWIS: Okay. All right. Before you take off, let me see if I've got any other questions. Do you have anything that you want to add on the other issues that you had?

MR. VanAMBERG: I would rely on the briefs for that, Your Honor.

JUDGE LEWIS: Okay. (Perusing documents.) I would say this and for the purposes of the other people in the oral argument. At this point I tend to agree with you on the

teacher index question, that once it's been factored in and when you start to take out the special ed kids from the formulas, that along with that you also have to take off any additional revenues in effect thrown off by the teacher index.

I guess that's about it. Okay. Thank you.

MR. VanAMBERG: Thank you.

JUDGE LEWIS: Does Gallup have anything they want to add to the membership question versus -- the LEA versus the student membership?

MR. KOZELISKI: No, Your Honor.

JUDGE LEWIS: Okay. Thank you.

Mr. Smith?

MR. SMITH: May it please the Court, my name is Mark Smith. I represent the assistant secretary in this proceeding.

The paramount issue in this case is whether it was unreasonable for the secretary to interpret the percentile exclusion of the statute in such a manner as to assure that the disparity test is an effective equity measure. In order to fulfill the statutory purpose the secretary has interpreted the statute as you've heard to mean that correct percentile exclusions are the specified percentiles of the total number of peoples in attendance in the schools of the state.

This method calculates the disparity based on revenues per pupil organized on an LEA basis. That is the data is reported and organized on an LEA basis after removing the statistically anomalous outliers based upon student population -- statewide

student population. This avoids the unfair and inconsistent results that can otherwise occur due to the happenstance of the size of particular LEAs and their location on the ranking that's under examination here.

This interpretation derives from the practice in the field. It's been incorporated into the department's regulations and applied consistently by the secretary since he originated the disparity test including the percentile exclusion in 1976. It's also been applied consistently since the enactment of Section 8009 in 1994.

Prior to 1994 the situation was that you had three equity tests that were included in the department's regulations under the general directive -- under the predecessor statute to define what it means to equalize expenditures.

In 1994 Congress repealed two of the tests finding them not to its satisfaction, and the third test, the disparity test, it codified into statute law without any indication that there was a desire to change the way in which it had historically been applied for almost 20 years at that point by the secretary.

Because the interpretation at issue in this case was embodied in the department's regulations it was binding upon the secretary and he would have had to violate his own regulations in order to take the position or apply the position or the methods urged by the Zuni district, and we respectfully submit and we will submit a brief on this as well that it is also binding upon the tribunal.

JUDGE LEWIS: What happens if in this case -- you've indicated in your brief that it was your view that the Congress made a mistake, that there were certain words in the statute that they left out or the draftsman changed the language in,

and as such there was substantial difference between what you said Congress intended to put in there and what Congress in fact put in there.

MR. SMITH: I think that in this highly technical field they weren't 100 percent accurate with their language. I think --

JUDGE LEWIS: All right. Can you take me through the statute and show me how using the language in the statute you can come to the result under the regulation?

MR. SMITH: Simply use the language of the regulation.

JUDGE LEWIS: In other words, the statute does not support the regulation? It's different?

MR. SMITH: It is different.

JUDGE LEWIS: And it calls for the result that Zuni asks for?

MR. SMITH: No, it does not, because I think that you have to read this particular language of the statute in -- with a view to its purpose, to the statutory purpose.

JUDGE LEWIS: Well, what's the statutory purpose?

MR. SMITH: The statutory purpose is for there to be a test that is effective in distinguishing equalized states from those that are not, and --

JUDGE LEWIS: Okay.

MR. SMITH: -- under the methods put forth by Zuni that's not the result that obtains. You are not correcting the essential defect in the disparity test and all range measures, for that matter, that by looking at the disparity, looking at some district near the top of the ranking and some district near the bottom of the ranking, you're putting undue influence on the extremes and not -- at the expense of looking at the entire range of expenditures effectively.

When practitioners in the field apply measures of this kind this is what they do. This is not made up out of whole cloth. And --

JUDGE LEWIS: But what Zuni's other argument is is that you essentially line up the LEAs according to their per pupil expenditures and then you essentially draw the line, 5 percent, 95 percent, which is the same approach that you use in the membership. The only difference is that you're just simply dealing with fewer LEAs as opposed to the number of members.

MR. SMITH: Well, the suggestion that it be done simply on the basis of LEAs -- and for 89 districts in New Mexico it works out to about five districts at either end -- that argument was rejected in 1976 in the rule making because the results are so different from state to state depending upon, as I mentioned earlier, the happenstance of which districts are at the top and bottom of the ranking? Are they big districts? Are they little districts? The results are inconsistent and unfair across the board.

So that method was rejected as not being fair and not being --

JUDGE LEWIS: But maybe this is what Congress told you. You've got to look at the statute, and if the statute says the moon's made out of blue cheese then it's made out of blue cheese as far as everybody's concerned.

And I've got a real problem if I have to decide this thing if I have to choose between what's in the statute and what's in the regulation. If you can show me the statute's ambiguous then under normal rules of construction you can then move over to the regulations which then interpret an ambiguous statute.

MR. SMITH: I can only do that --

JUDGE LEWIS: The problem is I don't see the ambiguity of the statute.

MR. SMITH: The only way I can do that is by reference to the statutory purpose. We've tried to provide evidence in the record to indicate that to give the disparity test utility this is the only possible interpretation.

JUDGE LEWIS: Well, you better give it utility than give it utility that you don't want.

MR. SMITH: Well -- or that Congress intended.

JUDGE LEWIS: But the only thing that we have from Congress is what Congress said in the statue.

MR. SMITH: Well --

JUDGE LEWIS: And if we go with Justice Scalia he would say, That's it.

MR. SMITH: I think we can read it reasonably in the light of the history, and the history, as I indicated, was that this test existed for a long period of time, presumably Congress knew how it was being applied. They had some dissatisfaction with the other two tests that were being applied at the time. They eliminated them. They essentially codified this one, did not indicate any change in the course.

JUDGE LEWIS: All right. So what you're saying is the statutory provision has to be construed in light of the total provisions that govern --

MR. SMITH: Yes.

JUDGE LEWIS: -- this question?

MR. SMITH: Yes.

JUDGE LEWIS: Okay. Go on.

MR. SMITH: Now, Zuni's argument that the secretary's interpretation is erroneous is very simply and very tightly focused. It's so tightly focused that the practicalities of applying the disparity test and the purpose of the statute are really beyond the OEA's consideration. They have a simple mantra and that mantra is that the language of the statute speaks in terms of such expenditures -- such percentiles of expenditures or revenues in the state.

But as I mentioned, at times we're all guilty of speaking with imprecision, and that's all the more so in a very technical field such as this one. Their argument begins to lose some traction when they actually get down to the nuts and bolts of trying to apply the test.

There's been some discussion this morning of the two methods that they have suggested. I see that the school district has finally come down more on the side of one than the other, but I would submit that neither of them are consistent with the language of the statute. And if they're not concerned about the practicalities of application it seems to me equally clear that they're not concerned about the statutory purpose.

They say again and again, Well, there's just too many districts that are being excluded by this method, and they're looking at the New Mexico example, of course from state to state again, according to the ranking and whether they're big districts at the top or small districts at the top. It's going to be different numbers of LEAs excluded. It's not always going to be as big a number as is the case here.

Sometimes it might be even a bigger case, but the point is the method has a purpose, and the purpose is to avoid reliance on anomalous results, and unless you do that you're not going to have an effective test. You're not going to be able to distinguish those states which are entitled to the other policy that exists under the impact aid law to prevent impact aid from undercutting their efforts at equalization.

It's a truism that impact aid is intended to compensate local school districts for the federal presence in one way our another, but that's not the only purpose of the statute, and I think we need to keep this statute -- this statutory purpose in mind when interpreting this particular statutory provision.

JUDGE LEWIS: Yes. But what they're really saying is that the primary function of impact aid is, as you have said, to compensate the school districts for the federal presence. That's the general rule and that's the statute.

Now you have an exception and when you're dealing with an exception and exception must be narrowly construed, and also in terms of that narrow construction given to the exception it has to be if the states have an equalized system, and they're just simply saying, Look, in order to get in under the exception you must be extremely well equalized I guess is the best way to put it. And therefore, there's nothing wrong with having a high standard as to whether you're equalized. In fact, that comports with the general intent of the overall statute.

MR. SMITH: But we have to take the statute as Congress intended it. They're equally unhappy with the 25 percent disparity level. We heard them say that this morning. To say that it must be highly equalized is not a refutation of what congressional intent was here. Congress clearly did not have in mind the high level of equalization that would satisfy these districts here and probably many other districts --

JUDGE LEWIS: Well, what they had in mind was the 25 percent --

MR. SMITH: Correct.

JUDGE LEWIS: -- which they said. Now, the question is upon what basis do you compute the 25 percent?

MR. SMITH: Correct.

All right. As I've indicated, the test was originated by the secretary. It's long-standing practice, and we would submit that as such it's entitled to a degree of deference by this tribunal. It's consistent with the practice of scholars in the field. There's evidence in the record here that indicates that the purpose of the exclusion is to make the test reliable by

preventing consideration of statistically spurious results. That the disparity test in particular requires such a device to prevent it from being unreliable.

That particular method that the secretary employed here is the correct way of doing it, where you're concerned with student equity and that the two methods being advanced by Zuni are ineffective and do not prevent the test from undue reliance on those kinds of results.

Zuni pays a great deal of lip service in its briefs to the notion that Congress intended a narrow exception, but what they really are seeking is to have this tribunal convert the statute into a mere illusion of an exception. That would not be consistent with the purposes of the statute. New Mexico is a highly equalized state. If it is not able to qualify under interpretation advanced by the school districts I don't believe that any state would qualify.

Let me just say a few quick words on their other arguments. Really I'll just touch on one other argument that they made in their reply brief to the effect that they are trying to interpret the statute to say that if a state avails itself of the percentile exclusion it is not permitted also to avail itself of the exclusions for cost differentials, which I'll discuss in more detail later on when you turn to the Gallup arguments. But there's nothing in the language or the logic of the statute that would support this outcome.

First of all, if you look at the statutory provision in question the two factors are listed there joined by the word and, which clearly indicates that in applying the test the secretary is to make both adjustments, not just one of them as Zuni argues. But even -- and I could stop right there -- but even apart from the language of the statute Zuni's argument

fails because it's illogical. The percentile exclusion, as I've said several times now, is meant to preserve the integrity of the test by preventing the consideration of anomalous results.

So why under any set of circumstances would Congress make it the option of the LEA to say, I'm going to undercut the validity of this test. I'm going to choose one over the other. I'm not going to use the percentile exclusion and we'll just go with anomalous results here. It's illogical. It's not consistent with the statutory language. It's not consistent with language.

The cost differential provision has a totally separate purpose, and I'll get into that more later on. Its purpose is to allow states to provide additional funding to school districts in recognition of additional costs associated with LEAs and children with particular characteristics. There's simply nothing in the statute that indicates that it's an either-or situation and if you look at the stipulations the districts have stipulated in paragraph 17 that the secretary is to apply both factors, and so I would submit that there is no merit to this argument.

Judge Lewis, at this point would you care for me to discuss their arguments about the kindergarten offsets -- Zuni's argument about the kindergarten offset and the cost differentials, or do you want to defer that?

JUDGE LEWIS: No. We can get into that at this point --

MR. SMITH: Okay.

JUDGE LEWIS: -- but before you leave, since you brought up a validity question, let's hear what you have to say about it and my power to invalidate.

MR. SMITH: Our view is that, first of all, it's not warranted in this case, but even if it was that just as the secretary was bound by the regulation to apply this interpretation in this case, which he did do, that you also are bound by those regulations with respect --

JUDGE LEWIS: I have a question. You brought this up in your reply brief. Why so late?

MR. SMITH: It wasn't until that point that I at least felt that they were clearly articulating their argument to be that the regulation violated the statute. I may not have perceived it as early as I should have, but that's why.

JUDGE LEWIS: Okay.

MR. SMITH: Turning to their argument about the kindergarten students, they argue that because -- Zuni argues that because the New Mexico funding --

JUDGE LEWIS: Excuse me, Mr. Smith, one moment.

Yes, sir?

MR. VanAMBERG: To avoid this, the legislature recently passed a statute allowing full-time kindergarten in certain districts -- the Zunis included in that, so it's no longer an issue.

JUDGE LEWIS: All right. So you are conceding that issue?

MR. VanAMBERG: We're conceding that because they now do get the funding on a full-time basis for kindergarten. The issue was they were only getting funding half time --

JUDGE LEWIS: Okay. So you're withdrawing your argument with regards to that particular issue?

MR. VanAMBERG: Correct.

JUDGE LEWIS: Okay.

Move on.

MR. SMITH: All right. Turning now to the cost differentials, the law recognizes that it's not inequitable to treat dissimilarly situated students dissimilarly and therefore the statute directs the secretary to, quote, take into account the extent to which a program of state aid reflects the additional costs of providing free public education in particular types of LEAs such as those that are geographically isolated or to particular types of students, such as children with disabilities.

What this means is that in applying the test the secretary is not to penalize states for recognizing extraordinary needs for particular students and particular LEAs and providing additional state support in order to meet those needs. And the regulations operationalize that directive by excluding cost differentials -- special cost differentials from the revenues for current expenditures that are included in the test.

So if you are -- if something is a cost differential it's appropriate under the regulations to simply not include those revenues in the test. There are three cost differentials at issue here argued by Zuni.

The first is the save-harmless revenues. These are revenues that are paid to very small districts that are experiencing precipitous declines in student population. This

is precisely the type of thing that was intended to be included in cost differentials. It's a characteristic of school districts and it was appropriate for New Mexico to recognize extraordinary costs that accrue at districts of this kind and provide additional weights for them.

The same is true with respect to small and rural school districts. New Mexico law again provides some additional support to these districts in recognition of the fact that they cannot take full advantage of economies of scale that larger districts are able to; the fact that rural districts are apt to be more isolated, have higher transportation costs, that kind of thing. Again, this is a classic cost differential and the treatment by New Mexico in its data was appropriate under the statute.

With the TEI the situation is a little bit different. Most of the TEI was not considered to be a cost differential and was included in the state's data. There is a small portion of that that Zuni is arguing should have been excluded. The portion of the TEI that's multiplied against special factors that were excluded as cost differentials, and there were others than the two I mentioned here, handicapped students and I don't know what the others were, but basically they're arguing that the TEI as applied to those other weights that were excluded from the formula also should have been excluded as the formula.

The state has not in this data submission argued that the TEI is a special cost differential. It has not opted to attempt to qualify for that kind of treatment here. Our position is that it is a revenue under the definitions and has to be included in the data, including the weight applied to the weights that were excluded, if I'm being clear there.

And furthermore, to the extent that the inclusion did anything to the data here it subjected more revenues to the

disparity test. In other words, it would tend most likely to overstate rather than understate disparity and so --

JUDGE LEWIS: But what Zuni is arguing is that if you're dealing with a typical student they don't have a problem with that in terms of teacher index. However, when you're dealing with special ed students against which the index is applied and then you take out the special ed students, you then must also take out the effect of the teacher index on those special ed students, and that New Mexico has not done.

MR. SMITH: Correct.

JUDGE LEWIS: So you're saying that it is correct for New Mexico to do what they did?

MR. SMITH: Because there is no indication or support for the argument that this was a special cost differential. In other words, it's a state option to exercise and they did not exercise it here.

JUDGE LEWIS: Okay. You've lost me. If you had a special ed student, one member, you apply the index towards that membership and then you end up with an adjusted membership or something like that.

MR. SMITH: As to those students.

JUDGE LEWIS: As to -- okay. Now, if you are then going to take out the revenues attributable to the special ed students, part of those revenues --

MR. SMITH: Well, you're only taking --

JUDGE LEWIS: -- or is that which has been kicked off by the teacher index. So I don't -- I see in my view Zuni's absolutely right. If you're going to put in special ed students and then you're going to take special ed students out, you also have to take out the effect of the index --

MR. SMITH: But you're not taking all the special ed students out. You're taking out the additional weight that they receive by virtue of their being special ed students, but they're also in there -- still in the disparity data as -- I don't know how to say it other than it's kind of not a very nice way of saying it, regular students.

They have a weight in there as a student but they don't have a weight in there as a special ed student. The extra weight -- the extra compensation that the school district is providing for that -- by virtue of that characteristic is being removed, but not the basic revenues that they have as a school district -- as a student. And so --

JUDGE LEWIS: I looked at the computations and it seemed to me that under the computations that when they went to compute revenue per pupil they took out all the revenues attributable to the special ed student because they cranked it out using the membership units and the program costs per unit, and in doing that they then left in the effect of the index.

MR. SMITH: I'm going to have to defer to the state on that.

JUDGE LEWIS: Okay. That's the way that I read the computations in there, and in that regards I think it's perfectly consistent to do what Zuni asks.

I've got one question on the save harmless. There seems to be a difference of opinion between you and New Mexico in terms of what provision under the New Mexico statute is applicable here for the save harmless exception.

You cited in your brief 22-8-25(d)(3), and New Mexico cites 22-8-25(g). Who's correct?

MR. SMITH: They're the experts on New Mexico law, clearly.

JUDGE LEWIS: So are you deferring to them to explain?

MR. SMITH: Yes.

JUDGE LEWIS: As opposed to their choice of the statute?

MR. SMITH: Both.

JUDGE LEWIS: Okay.

MR. SMITH: I have nothing further.

JUDGE LEWIS: I've got one question, and I want you to address this in your supplemental memo, and that is where it is clear that there's a difference between the statute and the regulation, which provision do I then proceed under? And I've got one other question. Do you consider the appendix as part of the regulations?

MR. SMITH: Yes.

JUDGE LEWIS: Is there any different -- entitled to any greater or lesser or the same weight as the regulation?

MR. SMITH: Same.

JUDGE LEWIS: The same? Okay. And do you believe that it's appropriate in an appendix to put in there an interpretation of the statute as opposed to put that same interpretation in the body of the reg?

MR. SMITH: I think here where the appendix is the nuts and bolts application, and this deals with the nuts and bolts issue, it was appropriate to do it that way.

JUDGE LEWIS: Okay. And would you say that your appendix is consistent with what you said in the body of the reg?

MR. SMITH: Yes.

JUDGE LEWIS: And what's in the body of the reg is the same as what's in the body of the statute?

MR. SMITH: It paraphrases the statute.

JUDGE LEWIS: So are you saying then that is the reg interpretive of the statute?

MR. SMITH: If by the reg you're referring to the --

JUDGE LEWIS: I'm sorry. The appendix.

MR. SMITH: Yes.

JUDGE LEWIS: Okay. Do you have anything else you want to add on this?

MR. SMITH: No. Thank you.

(Pause.)

MR. TARNOW: Good morning, Judge Lewis.

JUDGE LEWIS: Good morning.

MR. TARNOW: May it please the Court, my name is Jonathan Tarnow with the law firm of Brustein & Manasevit, and I'm here today representing the State of New Mexico Department of Education.

I wanted to introduce a few other folks who are here with us today from the department. Seated at counsel table with me is the Honorable Michael Davis, superintendent of public instruction for the state --

JUDGE LEWIS: Good morning.

MR. TARNOW: -- and Ms. Arlene Strumos, who is general counsel for the department.

JUDGE LEWIS: Good morning.

MR. TARNOW: Behind the bar is also -- I'll go in order of our right to our left -- Ms. Brenda Suazo Giles, who is executive budget analyst; Dr. Kathleen Forrer, chief financial officer; and Mr. Larry Mirebol, director of the school budget finance analysis branch.

And to the extent -- based on the arguments that we have had so far this morning, I don't think we'll get into some of the details of the state's calculations of its own program costs, but to the extent that you have any technical questions or matters of state policy which I don't feel fully comfortable answering, with your permission I would defer to the experts

from the state. But I have a feeling we won't get into those very technical issues based on what's been said already.

And as an initial matter, the cite that you just referenced regarding the save harmless, I must apologize. Mr. Smith is correct in his citation. That is a drafting error on my part, and I apologize for that.

Your Honor, as you have heard from counsel for both Zuni and the assistant secretary for elementary and secondary education this matter essentially regards the assistant secretary's fiscal year 2000 impact aid certification of New Mexico as an equalized state under Section 8009 of the ESEA and the applicable regulations.

As you know and as has been discussed this morning, states are generally not permitted to reduce state funding for LEAs because the LEA receives federal impact aid funds, and while that is the general rule, Section 8009 of the ESEA contains and exception which states that upon certification by the assistant secretary an equalized state may take into consideration the impact aid funds when calculating state aid.

While this does reduce, to use that word liberally, the amount of state aid the LEA may otherwise receive, the purpose of this exception is to prevent gross disparities in LEA funding in states that have attempted to equalize their own funding for all students within the state. In other words, Section 8009 recognizes that a state's efforts at providing equal educational opportunity for all students can be frustrated where some school districts in an equalized state would receive federal impact aid funding resulting in them having far more total funds per student than districts without that impact aid revenue.

In practice the exception provided, as has been said this morning by Section 8009 is not widely used, as only three states even qualify under the criteria. In order for the assistant secretary to grant the certification the state must provide evidence that the disparity in the amount of current expenditures or revenues per pupil among LEAs in the state is no more than 25 percent, and if that disparity calculation permits, the assistant secretary grants his or her certification.

JUDGE LEWIS: And is that certification made on an annual basis or is it made on some other basis?

MR. TARNOW: It's per fiscal year, Your Honor.

JUDGE LEWIS: So therefore when you go to compute the disparity test or the other tests that we have in here it's done on an annual basis?

MR. TARNOW: Right. And it uses the financial data from two fiscal years back for the current fiscal year. Impossible to do it based on projections for the current year and so the statute and regulation set forth that forward application of prior year statistics.

Essentially, Your Honor, I submit that certification was correct for essentially two reasons. First, New Mexico's calculation of its per pupil revenue is consistent with the applicable regulations, and this issue gets to the adjustments that were made et cetera. The state on this point would rely on its brief and really turn the focus to the second issue, which is the application of the methodology for determining disparity on the 25 percent test.

JUDGE LEWIS: Okay. Before we get to that, let's just resolve the teacher index. Do you think that New Mexico treated that correctly?

MR. TARNOW: The state has treated it in the way that it has done based on a 1992 directive from the department. In fact, Your Honor, if the state were to do as you suggest and remove all of the resulting adjustments, when it removes those students if they would go back and also remove the teacher and experience index in toto, the effect is to decrease the disparity even further. And the state has submitted with its initial brief at Exhibit 3, Attachment 4 and example of how that plays out.

So the state would not contest doing that. The state has been acting since 1992 under direction of the department. It was told that to do what you suggest was not a proper cost differential, but we would not object to doing so.

JUDGE LEWIS: I'm sorry. Let me see if I understand correctly. In terms of for lack of a better term the typical student, there's no question there that the index is included. Correct?

MR. TARNOW: Correct.

JUDGE LEWIS: Okay. And you've done that because the Department of Education has told you to do that? Okay. Zuni's question came up as to the -- I think that basically the special ed students --

MR. TARNOW: Uh-huh.

JUDGE LEWIS: -- and there's a point in there which they treated a little bit differently in terms of the cost differential.

Now, what if any teacher index should be backed out for those special ed students?

MR. TARNOW: Well, as it is done, as I understand the way it is --

JUDGE LEWIS: Tell me how it's done then tell me --

MR. TARNOW: If I understand how it's done correctly -- and it's highly technical -- when the special cost differentials are pulled out for those students they are pulled out -- it's usually kind of a tax term -- below the line, after the original adjustments are made. But based on the 1992 direction the state does not go back into the early part of those adjustments where the revenue program was calculated to revisit that and pull it out at that point.

JUDGE LEWIS: Okay.

MR. TARNOW: It's left in -- I want to say partially left in.

JUDGE LEWIS: Okay. But when they pull it out do they pull out the effect of the teacher index on that amount that's pulled out?

MR. TARNOW: I do not believe so under the current direction from the department.

JUDGE LEWIS: Do you not think it's appropriate to pull it out? If you're going to put it in and then take it out since

the teacher index is a factor that's applied to something, it seems to me that if you're going to take out part of that something you also take out the effect of the-teacher index in that something.

MR. TARNOW: In that something. And that's an appropriate interpretation, Your Honor, and it's interpretation the state does not disagree with. The state has not been following that interpretation based on the '92 direction of the department. The state is willing to do that if you find that its current practice is inappropriate.

JUDGE LEWIS: Okay. Yes. It doesn't have a dramatic effect. That I've seen from the calculations.

MR. TARNOW: Uh-huh.

JUDGE LEWIS: Okay. You can move on to the other argument. And by the way, as I read your brief on the main issue, you seem to think that the statute is consistent with the use of the student population, and I want you to show me how you get there under the terms of the statute.

MR. TARNOW: Well, actually, Your Honor, since submitting -- I think we've all done a lot of thinking about this issue and this conflict that seems to appear, and I'm not certain that we would state that so plainly at this point.

It is arguable that there's a difference, and we would defer to Mr. Smith on the department's interpretation. However --

JUDGE LEWIS: Hang on. Mr. Smith says that there's been an error made in the statute and essentially that there is a difference, basically that the statute says you look at the LEAs and the regs say that you look at the membership.

MR. TARNOW: Actually, Your Honor, the statute doesn't specifically state you look at the LEAs, and I have to respectfully disagree with Mr. VanAmberg.

JUDGE LEWIS: All right. I want you to tell me what your interpretation is and show me how you get there under the statute.

MR. TARNOW: Under the statute, which is reflected in the text of the regulation and not in the appendix, it states to excludes those LEAs at the 95th percentile and 5th percentile, or per pupil revenues or expenditures in the state. And those last three words are critical, Your Honor, because those are the three words that would require under that scenario to look at all the expenditures across the state, not just the expenditure of the LEA at the 95th and the LEA at the 5th.

To follow that methodology, which is not what has been done in this case, you would add up -- you would total the entire amount of expenditures in the state and determine where the 95th percentile falls and the 5th -- 95th and 5th percentile fall within the ranking of LEAs, and not to merely look at the revenue per pupil at LEA 95 and at the 5th. There's a difference there between adding up the revenues state wide and just comparing the revenue per pupil at the 95th and 5th LEAs.

JUDGE LEWIS: In other words, you're saying that you make up a list and for each LEA you put their revenues out there?

MR. TARNOW: Well, there's no doubt that a list has to be made. You have to rank the LEAs per -- by their revenues per pupil, per pupil expenditure.

What -- an alternative interpretation we're positing here now would be to look at all of the expenditures per pupil in the state -- or look at all the expenditures in the state --

JUDGE LEWIS: Okay. By that you mean expenditures per pupil?

MR. TARNOW: Correct. All the expenditures that are included among all the LEAs.

JUDGE LEWIS: So in other words you have a list that says school district one, $5 per pupil, number two, $4.50 per pupil. You make up a list like that?

MR. TARNOW: Correct.

JUDGE LEWIS: Okay.

MR. TARNOW: And then if I understood Mr. VanAmberg correctly, what -- how he would interpret that --

JUDGE LEWIS: I want to know how you interpret --

MR. TARNOW: Okay. How I would interpret that is you then have to multiply the expenditures per pupil in each LEA, so you have your ranking, but the number of pupils in that district to get the total amount of revenue. You're doing the math backwards.

JUDGE LEWIS: So you're doing it revenue per LEA?

MR. TARNOW: Looking at how much is spent on the top 5 percent -- look at how many -- we had certain number of -- some certain of revenues spent in the state --

JUDGE LEWIS: Are you trying to eliminate 5 percent of the totals revenues spent by Arizona schools at the top and 5 percent of the revenues spent by all the schools at the bottom?

MR. TARNOW: That would be an interpretation that we would suggest --

JUDGE LEWIS: And how you get that based on the language, because it says disregard local LEAs with per pupil expenditures. It says -- you're thinking per pupil expenditures as being total expenditures?

MR. TARNOW: Well, the per pupil expenditures -- I think we would emphasize that the final language is in the state. You have to look at all of the expenditures in the state to determine where that 95th and 5th percentile lines should be drawn.

JUDGE LEWIS: Okay. So --

MR. TARNOW: Because funding is by student. The funding is driven by student, not by LEA, and so we have to look at where the student receipt of money statewide.

JUDGE LEWIS: So basically you take the total amount spent in the state on all the students, say it's $100, and you would then draw up a list and at the bottom of the list you would have the school which spent the least total amount on its students. That would be the school at the bottom.

Then the next school would be the school that spent the second least amount?

MR. TARNOW: That's correct.

JUDGE LEWIS: Okay.

MR. TARNOW: Your Honor, we're not --

JUDGE LEWIS: So basically your list in great part would be based upon then essentially from a practical purpose based upon a ranking of schools according to student population basically.

MR. TARNOW: Student population and taking into consideration how much funding per student is received.

JUDGE LEWIS: Yes, but the funding's not going to be all that much different.

MR. TARNOW: The state is actually done this calculation --

JUDGE LEWIS: But that's how you interpret this statute?

MR. TARNOW: That would be our interpretation of --

JUDGE LEWIS: Which is then inconsistent with the regulation. Right?

MR. TARNOW: Arguably --

JUDGE LEWIS: Arguably?

MR. TARNOW: Well, it's -- again, Your Honor, we would agree with the department that the only reasonable way of determining disparity is on a per pupil expenditure and considering the students and not the LEAs. And even under the scenario we've just been discussing, New Mexico still satisfies the disparity calculation.

As you've raised, the issue before us is calculated in that the regulation and specifically the appendix arguably conflicts with the expressed statutory language. We concur with the department that it's a reasonable interpretation and we submit that the state is required to follow the regulation as it's stated. And the regulation itself, the text of the -- the body of the regulation specifically states that the methodology for determining the disparity is set forth in the appendix.

So we would therefore agree with Mr. Smith that the regulation -- the appendix to the regulation is in fact part of the regulation. The methodology in the appendix was included in the 1995 Federal Register rulemaking process. It is not, to use an example, it's not an interpretive memorandum that was issued by the department interpreting what the body of the regulation states. It is part and parcel of the regulation.

And so the real question here is whether or not -- from the state's perspective whether or not the state followed the regulation as instructed, and that includes the methodology that was in fact used.

Either way, whether you adhere to the methodology in the appendix or you take the alternative construction of the statute and regulatory text, New Mexico has satisfied the 25 percent disparity by a significant margin, and therefore, if there was an error it's a harmless error, because New Mexico -- the certification still would have been granted.

JUDGE LEWIS: But it sounds as if your view is that the statute in the body of the reg as opposed to the appendix calls for a result different -- or method different than what's been adopted in the appendix.

MR. TARNOW: I would -- I can see how -- I could make an argument that is the case.

JUDGE LEWIS: Don't make an argument. Tell me what your position is.

MR. TARNOW: Our position, Your Honor, is that the state followed the regulation and the regulation includes the appendix.

JUDGE LEWIS: Okay. I've got that. But now, how is that consistent with the statute, your interpretation of the statute?

MR. TARNOW: Literally, on the face of the words, perhaps not, probably not. But again, looking at the overall intent of the impact aid program, the fact that if we were to read this exception from Section 8009 in a way that the districts would have us read it that perhaps no state would qualify and the purpose of an exception is therefore undercut, and the purpose of an enacting it by Congress is then called into question.

Clearly, there is room -- we had it here today -- there is room for debate on that. Our position is that this interpretation as embodied by the appendix, as promulgated by the secretary with the regulation is an appropriate perhaps one of two or three -- it's an appropriate implementation of the statute, even though you could argue it otherwise.

JUDGE LEWIS: Okay. Now, what about my power to do something that is inconsistent or ignores the regulation?

MR. TARNOW: Well --

JUDGE LEWIS: And I'm especially interested in your viewpoint because you do appear as counsel for other states and other school districts, and so sometimes you may be on the other side of the fence.

MR. TARNOW: Actually --

JUDGE LEWIS: So if somebody's going to shoot at me squarely I think it may be you.

MR. TARNOW: And Mr. Smith and I talked about that. He was first to realize how I have a certain --

JUDGE LEWIS: That's good.

MR. TARNOW: -- bias against the department, as you know. But nonetheless, it's the position of myself and my colleagues that yourself and your colleagues in the Office of Hearings and Appeals do not possess the requisite authority --

JUDGE LEWIS: My colleagues in the Office of Hearings and Appeals are not administrative law judges. Okay? So we can exclude them.

MR. TARNOW: Okay.

JUDGE LEWIS: Because this is being heard under the Administrative Procedure Act.

MR. TARNOW: I would agree with your statement earlier, Judge Lewis, that there is not the authority either in the impact aid statute, regulations, or some other authority for you to set aside this regulation as inconsistent with the statute. We'll be happy to provide a supplemental brief as suggested, but I would go back to the very case you cited, Lemont, the

case cited by the department, that the decision to be made here today albeit an uncomfortable one for you certainly is whether or not the state's process and the department's certification complies with the reg.

JUDGE LEWIS: All right. But what do I do if there's a clear problem with the regulation and the statute, that it's clear that the statute says A and the reg says B?

MR. TARNOW: I think --

JUDGE LEWIS: Am I not bound almost if you will be high authority to say that the statute has greater significance than the regulation?

MR. TARNOW: What I would do in your position, Your Honor -- and I don't envy your position -- would be to state that in a ruling upholding the application of the regulation in this instance but stating very clearly your concerns that the regulation is inconsistent with the statute and leave that as a matter for appeal to the secretary or as you suggested federal court litigation as opposed to APA litigation.

I -- the precedent -- and it's not just within the Department of Education but it's a general Administrative Procedure Act issue of an ALJ setting aside a regulation. The precedent is fairly long standing, and --

JUDGE LEWIS: It is.

MR. TARNOW: -- and as tempting as this case may be to ignore that precedent, given the circumstances -- I think a way can be found to apply the regulation as we did and to uphold the application of the regulation and to note for the secretary or anyone else who may have the authority to

change the regulation or to set it aside that you have serious concerns about -- or that you expressly find the regulation to be in conflict with the statute.

But I do not think this is the time to overturn that precedent. It will set a precedent not only for the department but other lawyers like myself who do general administrative law will see that decision and I think the effects could be -- are unforeseeable, even though there's a long precedent the other way.

JUDGE LEWIS: You spoke of this long-established the other way. Do you have any particular cases that you know about?

MR. TARNOW: I couldn't name them off the top of my head, Your Honor, and I apologize for that, but I can certainly cite numerous cases from both the Department of Education and other departments in a supplemental brief.

JUDGE LEWIS: I would appreciate if you would do that in your supplemental brief.

MR. TARNOW: I certainly will.

Is Your Honor at all -- I believe we've exhausted the heart of the dispute on the percentile calculation. I could walk through the specific numbers that were used in applying the appendix, but I know that is in our briefs and in the interest of efficiency we can not address that right now if you would care to avoid the --

JUDGE LEWIS: I don't have any real questions in terms of the other issues other than the teacher index that we went over and the one clarification on the cite.

MR. TARNOW: I will leave the other issues for the briefs, Your Honor, and summarize that the impact aid program recognizes that in states attempting to equalize their educational funding for all students in the state that with impact aid some school districts might receive a windfall, frustrating the state's efforts at equalization.

The presence of impact aid funding which did frustrate the state's equalization efforts was recognized in the mid 1970s when this exception was carved out, and for that reason a Section 8009 was enacted.

In this case, New Mexico demonstrated, as I've stated, that using the disparity calculation promulgated in the regulation and the appendix to the regulation which we see that they must be read together as a -- in unity as a single enactment -- promulgation of the secretary, that new demonstrated it properly applied that regulatory requirement that it satisfied the criteria to be deemed equalized under Section 8009, and therefore the assistant secretary certification should be sustained.

JUDGE LEWIS: My only point to you would be that as I read the regulations, the body of the regulation in effect parrots what the statute says, and it's only when you get to the appendix that it becomes apparent in there that the level of comparison is based upon student membership, if you will.

MR. TARNOW: I would not disagree with -- that appears to be the case, but nonetheless, the appendix is part of the regulation and was promulgated together with the body of the regulation through notice and common rulemaking, and therefore the application of that appendix is as valid as the application of any other interpretation that may come out of the text of the reg.

And the department's expressed statement that the methodology to be employed is in the appendix is something -- and that's in the body of the regulation --

JUDGE LEWIS: Cooperation by reference.

MR. TARNOW: Exactly, Your Honor.

JUDGE LEWIS: Okay.

MR. TARNOW: Thank you.

JUDGE LEWIS: Mr. VanAmberg, do you have anything else you want to add on this?

MR. VanAMBERG: Just briefly, Your Honor. I would -- addressing Mr. Tarnow's arguments, I would suggest to the Court that the idea that you rank the districts according to size essentially and then I'm not sure what you do after that. I guess then you eliminate the top 5 percent and the bottom -- and the lower 5 percent, and then I guess you would then compare per student expenditures from the top and the bottom.

The ranking has nothing at all to do with the comparative wealth of the districts, and that is the whole purpose of the statute as I see it, is to see if there is a disparity. It would just be -- you could very easily end up with identically funded districts at the top and at the bottom I think under his proposal.

The comment that if the methods suggested by Zuni were employed in determining whether equalization exists would result in no state qualifying I think means that there's a crisis out there. You've got supposedly equalized funding among

districts. As we've discussed you take out financial influences which reflect idiosyncratic problems with a district's special ed size density, so you make the funding more or less equal and you have equal students in the body.

You then allow for 5 percent discount of the 25 percent disparity and no one will -- no state in this country will have equalized educational opportunities according to that formula. I think that's unfortunate, but I don't think that that problem should drive what the formula is. I think that's another problem that reveals.

Mr. Smith stated that there is a -- that the purpose of the formula as set out in the appendix is to account for -- try to even out disparities which are based again upon these idiosyncratic elements which are found in the districts, and I would submit that those elements are reduced through the deductions that are made through the state, which they are allowed to make anyhow for the funding.

Concerning the utility of this formula, if you were to have let's say Albuquerque up at the top and Las Cruces down at the bottom and you were to use the state's method where you reduce students, you end up in absolutely no elimination of any LEAs from the formula, but if by happenstance you have small districts at the top and small districts at the bottom you end up with a widely different result.

I think the most important --

JUDGE LEWIS: I think in part what he's saying is that from a statistical viewpoint if you utilize students or membership as opposed to LEAs you end up with a better comparison, and that's because you have substantially greater number of students than you do LEAs.

MR. VanAMBERG: But the problem is then -- is that Congress talks to equalized funding among LEAs and so you're eliminating the students, and this could end up, as is happening in New Mexico, eliminating a number of LEAs, 28 percent of them.

JUDGE LEWIS: Right. But that may be because they occupy a substantially small part of the population of LEAs.

MR. VanAMBERG: They do, but Congress does not say we're more concerned with an LEA which has a large population than we are with LEAs that have a small population. Each LEA has its own rights and is considered equal under the statute. And so when you start eliminating them to the point that you're -- that the true disparity is masked, I don't think that's the appropriate way to do it.

I would like to address an issue that Your Honor touched upon and I think is very important, and that is the fact that the regulation itself -- there are two parts to it. One is that the regulation states, specifically 34 CFR, 222.162, in determining the disparity percentage, the secretary shall disregard LEAs and per pupil expenditures or revenues above the 95 percentile or below the fifth percentile of those expenditures of revenues in the state."

That's the statute. So you've got a situation where there's not -- there is a conflict it is true between the appendix and the statute, but there is also a conflict between the appendix and the actual body of the regulation itself. I don't think that Your Honor would have to invalidate the regulation more than it would have to resolve an inconsistency within the regulation itself.

And I am suggesting, Your Honor, that the body of the regulation which is supposed to -- which mirrors the statute -- the fact that it does mirror the statute certainly defines the intent of that regulation, which is to comport with the statute, and the only way to resolve the difference between the appendix which conflicts with the main body of the regulation would be basically to ignore the appendix and follow the body of the regulation itself.

That's all I have, Your Honor.

JUDGE LEWIS: That's an interesting point, counsel, and I want you to address that in your brief. Essentially what he said is that I'm really faced with resolving an inconsistency between what's in the regs and the appendix, and therefore I have to choose one or the other. Interesting.

Nothing further, Mr. Smith?

MR. SMITH: No, sir.

JUDGE LEWIS: Mr. Tarnow?

MR. TARNOW: No.

JUDGE LEWIS: Okay.

It's your turn.

MR. KOZELISKI: If it please the Court an opposing counsel, Your Honor, I'd like to -- I won't introduce all the members but we do have board members here from both the Zuni School District and the Gallup School District, both of our superintendents, and some of the support personnel for the district.

JUDGE LEWIS: Thank you all for coming. I appreciate it.

MR. KOZELISKI: Your Honor, what I'm here to argue is if Mr. VanAmberg does not win his argument on equal -- being equalized, which I believe he will, then we turn to what proportional share of the 874 funds if the state is in fact equalized can be kept by the state, and it's my understanding of the state's position is that we've been doing it for all these years and no one's objected, and so we must be doing it right, or that it is beyond the review of this tribunal.

We don't agree. We believe that Your Honor can rule on it and send it up the chain.

In the joint stipulation 6, which was also quoted in page 6 of the state's first brief, is the proportionality language which says, "Upon certification by the department as being, quote equalized, the state may take impact aid payments into consideration only in proportion to the share that local tax revenues covered under the state equalization program are of total local tax revenues."

And what I would like to touch on first is what the state and the districts agree to -- our Gallup does, and I'm sure Zuni's in agreement.

The state took 95 percent of all 874 funds up until July 18, 1999. Since that time the state now takes 75 percent. The Gallup School District is made up of 83 percent non-assessable federal land and 17 percent private land. For the year 1998 the private land in Gallup is 17 percent generated $245,774 in support of state schools, and statewide the property tax generated was $7,699,000.

Now, the state -- we believe that the state's picking of numbers such as 95 percent and 75 percent are completely arbitrary, and we believe that they dropped it from 95 percent to 75 percent because Zuni, joined by Gallup and another district, Grant-Cibola, filed litigation in state court over funding. And at the next legislative session it was reduced from 95 percent to 75 percent.

And the reason I believe that it's finally come to pass is the districts move slowly. They tried to work through the state department of education and that didn't work. Then they went to the political leaders and that -- both here and in Washington and that didn't work, and finally they've resorted to the courts. We have a civil case pending out in Gallup in the Eleventh Judicial District, a state court, and we've taken this appeal.

And it all stems -- all these actions stem from the equalization formula. Prior to equalization Gallup-McKinley County, which at that time include Zuni, was one of the top districts in the state as far as pay scales and income, and there's no doubt that the state wanted to get their hands on Gallup's money.

And the state -- I believe it's in Attachment 5 to their original brief has the entire testimony of a Harry Wugalter. He was the head of the state school public finance, and they rely on his testimony as Congress having the knowledge that -- what New Mexico was doing. And his report to the governor and to the legislature in 1974 -- I'd like to just read three sentences out of it. It's out of the forward. It's the same gentleman.

"The 1974-75 school year was most interesting for New Mexico. This report reflects the first complete year of the

effect of the new school financing funding formula which continues to be acknowledged by the many organizations that have learned of it as one of the finest equalization plans in operation in the United States."

The second paragraph of his forward states this. "The second phase in New Mexico's equalization efforts involves capital outlay, and we intend to present to the 1976 state legislature a plan which will provide equity in this critical area of school support."

Now, I am sure that he presented that to the state legislature. The problem is the state legislature still hasn't acted on it. And the money which the state has taken which is basically a substitute for property tax for the lack of private land in McKinley County they're using for operational purposes. And our original argument was that the brief -- when we briefed it at the start, 65 percent of funding for state schools came from state property tax and 35 percent came from PL 874 funds.

And this chart here, which I would just like to show the Court, is -- in 1981 before what we called the big max tax cut, in which the state basically gutted the property tax in support of public schools, property tax was 10 percent and impact aid was 4 percent. The rest of it was from sales tax and other sources. To us that isn't an issue here. Gallup and McKinley County and Zuni have -- they pay a lot of those type of taxes because there's tourist industry and the Native American art that's sold out there, so I doubt that the state will bring that up.

But we're really dealing with these two little pieces of the pie, a 4 percent and a 10 percent. In '82-83 property tax was at 1 percent and the state -- or impact aid stayed at 4 percent.

After the state reduced it down to less than a percent -- it's really at 50 cents per $1,000 of the valuation -- it doesn't even show up as a percentage.

But at the same time, the state has kept -- it was 95 percent and it's now 75 percent, and I believe that our first analysis -- and probably a side for the Court which I would like to bring out is the two superintendents of our districts filed a one-page appeal on these issues. After that, Mr. VanAmberg and I became involved. And at about the time that the joint stipulation was filed with Your Honor was the first time that either Zuni, Gallup, or any other school district actually saw how the state did their calculations, and really until this day people are still looking at it, going, Oh, look at this.

And so I would ask the Court to forgive how we've -- I think Mr. VanAmberg said we've kind of changed as we've grown through this process, but we really didn't get to see any of the numbers until May of this year. Up until then there was a two or three-page submission, and people are analyzing it and so my theory -- I don't want to say has changed since the first because I think the proportionality at the time that equalization started is valid, but the state had a problem with it in their -- I don't call it reply brief, but with their brief in chief or their brief of their motion for summary judgment.

And we came back and said, Fine. If that's your position then we'll just take a percentage. If private land of 17 percent of our district generates $245,000, what I did was solve for X. If that's it then what should the state get from the 83 percent of federal non-assessable land? And I believe that's on page 4 of our reply brief, and I indicated that it would generate basically $1.2 million.

Today in reading the regulations and everything for about the seventh or eighth time, I don't want to say I've come up with another one, but I think it's another option that Your Honor has, in that the private land in McKinley County for our school district generates the 245,774. Statewide tax -- property tax generates $7,699,000.

So under the proportional share of the local tax revenues to the total local tax revenues for the state, what I did was divide Gallup's -- McKinley County's portion by the statewide portion. You divide 245,000 by 7,600,000, and Gallup's share of the state's whole is 3.19 percent. So the state should be able to take no more than 3.19 percent of the PL 874 funds designated for Gallup-McKinley County schools, which would be in the area of $675,000.

Basically what it is is the property taxpayers in McKinley County are supporting state education to the tune of 245,000. Okay. What is the federal government's responsibility for their portion of the land in McKinley County, and that would be $674,000 for the year 1998. So it is a proportionality issue.

I think the Court has the choice of going back to when equalization started, or they can take it based upon federal land versus private land in the county, or they can do it based upon the -- which is a kind of more strict interpretation of the regulation that what the local tax revenues are to the total local tax revenues for the state -- now, the State of New Mexico controls how much they can take. They can up it, they can up the tax rate, or they can take it down.

Now, for whatever reason federally PL 874 funds have grown from about 19 million up to $56 million statewide. At the same time the state has seen fit to reduce the property tax

support for education from -- at one point it was over $11, or $11.25 per $1,000 of valuation down to 50 cents. It's their choice.

Now, all the other sources of revenue -- Gallup and Zuni are part of that. We're paying sales tax. We're paying all the taxes that everybody else -- as a matter of fact, I'm sure the state won't argue it because our share is quite high for the state average.

And what the state seems to forget is -- let's say there's District A that has no federal land. At one point they were paying $11.25 per $1,000 of valuation into the state coffers to support schools, and the 17 percent of us out in Gallup that owned land were doing the same thing.

Now, Gallup -- 83 percent which is non-assessable federal land, up until a year and a half ago the state was taking 95 percent instead of really should be 50 cents on a thousand dollar valuation. But they're taking our base for what we could use to support our local school districts. It's freed it up for all the school districts that don't have federal land.

But the state has continued to take the lion's share of our district's money for operational support statewide.

JUDGE LEWIS: But isn't that the way that the statute works when you try to equalize? If you're in a state that doesn't equalize then the federal money given to the local school district -- the impact aid is their's, period?

MR. KOZELISKI: Right.

JUDGE LEWIS: Okay. Then states tried to equalize, and the problem they had when they tried to equalize was

they had all this federal money coming in to different school districts. Some districts got it and some districts didn't, and therefore the states essentially ran into a roadblock. They could not equalize because of the major impact of the federal aid.

So they went to Congress, and then Congress came through with this idea of creating an equalization program, and initially they provided three different measures of tests: wealth neutrality, disparity, and a third one. And moving on, at this point the only test remains is the disparity test, but the idea is to take the federal money and in effect throw it in as part of the pot of money that's then distributed to the different school districts so that everybody ends up with essentially the same part of the pie.

MR. KOZELISKI: Your Honor, I agree, but what the state has done is they are not using -- we can go back to '74 when it started or we can use it now -- the amounts now that they're not throwing it all into the pot.

JUDGE LEWIS: They've taken part out of the pot.

MR. KOZELISKI: Right. But what I'm saying is we're talking about -- the state at one point decided that when it started this was the share of property tax, and the state decided that they didn't want to use property tax base.

So what we're arguing is they can take the same proportional share that they take from property tax because the -- as so well stated in their brief on their final page of the final attachment it states that the original concept of impact aid was simple: reimburse school districts for either the loss of real property, which is our case, or federal activity.

So what they're doing -- a school district that has no federal property -- this is a bonanza to them because they actually get some of our money, but they're not sending us any of their property tax, and districts with high levels of federal land -- Zuni is probably at 98 percent and we're at 83 percent.

The state -- it wasn't a bad deal to start with until they decided to gut the property taxes as support for schools, and what we're saying is if you don't want to use it for support of schools then fine, we get to keep it. And I think under the regulation where it says only in proportional share of that local tax revenues, which would be the 17 percent or to the total of the tax revenues.

The state has control of how much they want to use. They just don't want to use this money, but the property tax substitute for the federal lands -- they're going to keep that, but all the districts with private lands don't have to kick anything more in than we do from the standpoint of sales tax and the other sources of revenue.

So our argument is, Your Honor, that the state can't take any more than the proportional share that the private property owners in McKinley County pay into the state. I guess my question to the state is, I believe it's on -- well, part of the joint stipulation on page 6, paragraph 14, local revenues as defined by state statute is 75 percent of the LEA's receipts of school district property tax prior to 1999. It was defined as 95 percent.

Did they come up with that? They just picked numbers out of the air? I know why they lowered it, because we sued them in state court. But our proposition is this is the formula. If they want federal money they have got to go -- if they want

the 874 funds they have to use the formula of local tax revenues to total local tax revenues.

They just can't -- the legislature can't say, Okay now, this year it's going to be 69 percent. The state legislature of the state -- no one's ever called them on it so they've done whatever they wanted to do up until this point, but they cannot take federal money without following the regulations set out in the statute. The state's just making up these numbers: 75 percent, 95 percent.

We believe that this formula should be followed, and whether the Court wants to go back to the inception or use one of the formulas of private land versus federal non-assessable land or the actual revenues generated by that district.

JUDGE LEWIS: I -- at this point I don't see how I can go back to the inception of the plan.

MR. KOZELISKI: I agree, Your Honor.

JUDGE LEWIS: I've got to fit something in under the regulations, so now you've got to show me something that I can wedge into those regulations.

MR. KOZELISKI: Well, Your Honor, that --

JUDGE LEWIS: Okay. And in terms of the proportion at the inception of the plan, the problem with that is that the proportion analysis is made on an annual basis.

MR. KOZELISKI: I agree, Your Honor, and the one I just told you earlier -- I said you could go back to that and I realize the problems and our view has changed the more we

learn, but basically what I'm arguing to the Court today is that what private property generates in McKinley County for state school support is to the statewide support, that's the same percentage the state can keep of the PL 874 funds, and that is 3.19 percent.

JUDGE LEWIS: Okay. So if I understand what you're saying, you're saying the amount of state revenue generated by the property tax that's covered under the state plan is to the total amount of statewide tax generated?

MR. KOZELISKI: No. Property tax generated.

JUDGE LEWIS: Statewide property tax generated?

MR. KOZELISKI: We're dealing with --

JUDGE LEWIS: Okay. As opposed to the state property tax generated by Gallup?

MR. KOZELISKI: Right. We generate property tax out there to support the local hospital, and the small college.

JUDGE LEWIS: Right.

MR. KOZELISKI: What we're arguing is that based upon the regulation what Gallup-McKinley school district's private property owners generate to the state property tax generated as a whole for support of public schools, that's the same percentage that the state can keep of the PL 874 funds.

That's all I have Your Honor, if you have any questions.

JUDGE LEWIS: Okay. No, I don't.

Mr. VanAmberg, would you like to add anything?

MR. VanAMBERG: I have nothing to add, Your Honor.

JUDGE LEWIS: Okay.

Mr. Smith?

MR. SMITH: In its brief, although I didn't mention it here today, Gallup-McKinley criticized the state for allegedly using impact aid funds to supplant local tax revenues, but they don't cite any statutory provision in support of the supplanting argument. Zuni for its part doesn't make an argument in its brief that there's been supplanting, but its superintendent's affidavit accompanying its brief argues that 20 USC 6322 applies, but this is a provision that applies strictly to Title 1. It doesn't have any applicability here.

In fact, there is no statute that makes it a supplanting violation with respect to impact aid for an equalized state to reduce reliance on tax revenue. And moreover, tax revenues are usually a prime source of inequity in many cases.

The reason I'm going into all this is because the argument that they make here about the proportion are really just sort of a guise for making the supplanting argument that they really would like to make, but number one, there's no statute to support it. Number two, the facts don't support it.

If you look at Attachment 2 to the four affidavit accompanying the state's brief you'll see that the trend has been in New Mexico that as reliance on local taxes has declined the state has increased its share of operational

expenses for education, also under the funding formula 100 percent of program costs are guaranteed, so that argument really doesn't carry a whole lot of weight.

The argument that the ceiling on permissible offsets should be limited according to the amount of local tax revenues that the district raises is not even a proportional argument, so it's clearly not consistent with the statute. There's no proportion there. They're saying, We raised $245,000 in local tax revenues, therefore that ought to be the ceiling on the impact aid offset, but there's no basis for that in the statute.

The second argument that we go back to the percentage share back in 1976-77 when the equalization program went into effect also is without merit. There -- although it's a proportion it's not consistent with the statutory portion. As you observed, Judge Lewis, there's nothing in the statute that establishes a year the funding formula was established. It's the baseline for purposes of the proportion.

And as the state's pointed out in its brief, the purpose of the proportion is to increase or encourage states to cover more of the local revenues in their funding formula to equalize more local revenues in order that states would become more equalized. That's what the proportion is attempting to do here. The 75 percent and the 95 percent that we heard mentioned here this morning represent the amounts of local revenues that the state has concluded that it can cover under its funding formula, that it can provide equalization funds to match.

And it is each LEA's proportion of local tax revenues to its total local tax revenues that is the statutory proportion that is to be applied here, and that's simply not what Gallup-

McKinley is arguing here. They have their own extra-statutory standards that they would like to apply here.

You've heard a lot of policy arguments made this morning. There may be policy arguments that can be made for some of these standards or other ones, but I would submit that it would not have been appropriate for the assistant secretary to consider them and likewise it would not be appropriate for this tribunal to consider them.

That concludes my argument.

JUDGE LEWIS: What about the last option that was just raised where the proportion is based upon property taxes raised in Gallup over total state property taxes? What's the matter with that proportion in terms of using it under the regulation?

MR. SMITH: I don't believe that's consistent with the language of the statute. Local revenues covered means those revenues that the state equalizes of total, and then the denominator is total local revenues. I don't believe that approach is consistent with that.

JUDGE LEWIS: Is that approach inconsistent with either the definitions of local tax revenues or total local tax revenues?

MR. SMITH: I don't believe with the definitions, but with the regulation that tells you how to apply them I think it is.

JUDGE LEWIS: Do you mean the examples? Is that it?

MR. SMITH: First of all, it's not made on a case by case basis. I'm speaking about --

JUDGE LEWIS: Well, they would say it's made on a case by case basis because you would determine a different percentage for each LEA, so I think they would say it's a case by case basis. So I don't think that's a problem. At least I don't see it.

The question is one of whether it's consistent or inconsistent with the regulations, and if memory serves me right I think there is an example in the regulations which essentially utilizes the local tax revenues as being those revenues attributable to a single LEA. In other words, you compute a percentage for one LEA and then you compute another percentage for another LEA, and it may be different because the percentage -- because the local total tax revenues may vary.

MR. SMITH: Correct.

JUDGE LEWIS: Do you have the definition of total local tax revenues?

MR. SMITH: Yes. (Perusing documents.) Total local tax revenues means all local tax revenues as defined in paragraph C including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question, but excluding all revenues from state and federal sources.

JUDGE LEWIS: What does C say?

MR. SMITH: C -- it says a revenue is a revenue for current expenditures and in turn current expenditures mean total charges incurred for the benefit of the school year in elementary or secondary school program. It does not include expenditures for capital outlay, debt service for capital outlay,

expenditures for state -- from state sources for special cost differentials, expenditures of revenues from local or intermediate sources that are designated for special cost differentials, expenditures of funds received by the agency --

JUDGE LEWIS: So basically it's current operating --

MR. SMITH: Yes, essentially.

JUDGE LEWIS: -- expenditures?

To each of you, you might add in your list of an issue to address the last option that was raised by Gallup as to whether that falls within or outside the regulations. Since that was just raised at this point I'll give you all a chance to provide your views.

And for Gallup, if you would like to expand on that, go ahead. Okay? Because the name of the game here is to try to come up with the correct answer to all things.

Do you have anything else, Mr. Smith?

MR. SMITH: I have nothing further. A question -- would it be possible for us to have a copy of the transcript of this hearing in preparing these additional remarks?

JUDGE LEWIS: Yes.

MR. SMITH: I'd find that very helpful.

JUDGE LEWIS: Yes.

Let's go off the record for a second.

(Discussion was held off the record.)

JUDGE LEWIS: Let's go back on the record.

Mr. Smith, anything else?

MR. SMITH: I have nothing further.

JUDGE LEWIS: Okay. New Mexico.

MR. TARNOW: Your Honor, once again, the state would endorse and incorporate the comments of the department on this because we do feel that the department has stated the case to a large extent.

One thing that I believe needs some clarification -- and the superintendent can speak to the philosophy of the New Mexico funding program -- but Gallup's focus on property tax I think is misplaced, particularly since the regulations do allow for the consideration of other taxes, and that's particularly important in New Mexico where school support comes from a variety of sources, including general fund as appropriated by the state legislature, which includes general and gross receipts tax, income taxes, interest earnings within jurisdictions, severance taxes, license fees, and other receipts.

And so therefore particularly on the last option raised by Gallup to use a percentage of property tax only really ignores the fundamental philosophy and purpose and structure of the New Mexico public school finance stature.

JUDGE LEWIS: Right. But the problem here is we're trying to fit New Mexico into a federal statute, and the federal statute's drafted with the idea that there'll be other states and every state has its right to do however it wants to operate.

But if you want the federal funds you've got to be consistent with what the federales want.

My question to you is when you get to the proportion we are concerned with the proportion with essentially the state property taxes and only the state property taxes. Is that correct?

MR. TARNOW: I would not say that's correct, Your Honor. Local tax revenues includes under the definitions and the regulations far more than property taxes. And in fact --

JUDGE LEWIS: Well, but in terms of here, in terms of how New Mexico did its proportion computation included in those figures, is there anything other than state property taxes?

MR. TARNOW: If I might defer to the expert on that --

JUDGE LEWIS: Sure.

MR. TARNOW: -- Brenda?

MS. GILES: [Inaudible].

JUDGE LEWIS: I mean, it is my understanding, based on the state law that New Mexico has essentially said that 75 percent of the state property taxes shall be covered under the equalization plan.

MS. GILES: Yes, Your Honor. That's correct.

JUDGE LEWIS: And so then there are no taxes other than state property taxes in that amount?

MS. GILES: That's correct.

JUDGE LEWIS: Okay. Thank you. And in terms of the total local tax revenues that consists of solely state property tax revenues?

MS. GILES: Well, we considered the local property tax rate as what's generated by each LEA with the assessed valuation that is within that district.

JUDGE LEWIS: Okay. But there aren't any sales taxes in there?

MS. GILES: No.

JUDGE LEWIS: Or anything else?

MS. GILES: All the sales taxes would be incorporated in the state revenue that comes into the school district, because they're collected at the state level.

JUDGE LEWIS: Okay. Through some other form?

MS. GILES: It's through the state equalization guarantee, which is funded with appropriation from the general fund, so all those other local tax -- those other type of taxes, sales taxes, income taxes, are part of the general -- state general fund.

JUDGE LEWIS: Okay. Thank you.

MR. TARNOW: That's my point, Your Honor. I'm raising that as while that proportionality does speak directly to the property tax there is -- and I agree that we're trying to fit New Mexico into a federal scheme -- I think that last

option would frustrate the equalization efforts as much as decertification asked for by Zuni.

And I think while it's instructive and helpful to look at the history of the 95 percent and 75 percent, so long as that falls within and can be made to fit in to the federal proportionality test, whether it's 95 or 75 or any other number which Gallup claims is arbitrary I would submit that so long as it does not violate the federal statute that's a matter of state policy.

JUDGE LEWIS: I would tend to agree on that. They could take 100 percent if they wanted to. It's just a matter of what the proportion is.

MR. TARNOW: Exactly.

JUDGE LEWIS: But my question to you is for purposes of the proportion they're using as the numerator, the state property tax is generated for a particular LEA if you will, and then as the denominator they're using the total state property taxes. So you've got 75 percent, so they're saying that if it happened to be $75,000 and 100,000, and the 100,000 was the amount of state property taxes that was generated, they would say that they would take that as the total state taxes for the denominator, but for the numerator they would use the LEA's total taxes -- total property taxes.

Do you have a problem with that?

MR. TARNOW: The state does have a problem with that, Your Honor, but --

JUDGE LEWIS: Okay.

MR. TARNOW: -- but not having heard that argument until today I think we would require a supplemental brief to really examine it.

JUDGE LEWIS: Okay.

MR. TARNOW: It does not certainly fit into the state scheme, and I think we will find upon parcing it out that it doesn't fit into the proportionality test either. And --

JUDGE LEWIS: But the states are supposed to design their scheme to fit within the federal scheme, not the other way around.

MR. TARNOW: Well, and I believe it has. It's just the matter of the way New Mexico equalizes creates some unique situation -- unique circumstance which -- a philosophy under the state equalization guarantee causes one to maybe have to apply the proportion on a way that doesn't violate it but perhaps isn't as cut and dry as the districts might otherwise submit.

JUDGE LEWIS: My question is I have to look at this and look at the regulation and see how the different arguments fit within the regulation.

MR. TARNOW: I understand that, Your Honor, and I think -- I know we'll be able to make a case that this argument -- that argument proposed by Gallup today does not have merit in the regulation. Federal law, state law -- federal law, federal regulation, or the state law, and the state law is consistent.

And as to the other matters of -- as I stated, we would defer to Mr. Smith and the department on the other

interpretations raised by Gallup in its other briefs. We similarly find they have no basis in the statute or regulation.

JUDGE LEWIS: Thank you.

Okay. Any rebuttal?

MR. KOZELISKI: Just a few words, Your Honor.

I guess as a personal note when you were talking about the scheme and fitting it into the federal scheme, I was thinking that maybe this is all just a big scheme to keep my client's money, and the reason I say that is when Mr. Gomez called me the first time to help him out on this he told me about it and I said, No, they don't do that to you, and it took about three meetings for him to convince me that this was going on and that it wasn't fair.

But our district is penalized severely, and I think it's our point that we have to be treated the same as a district that has no federal land, and we're not. Clearly --

JUDGE LEWIS: But the statute says that you're not. That's inherent in there. It's inherent in the exception --

MR. KOZELISKI: That's right.

JUDGE LEWIS: -- that you're not going to be treated the same in the sense that you may get federal monies and then lose some of those federal monies.

MR. KOZELISKI: We don't mind losing some of them, Your Honor. We mind losing a giant portion of it --

JUDGE LEWIS: But the answer to part of that question may lie within the state.

MR. KOZELISKI: Yes, Your Honor. Well, we have other litigation going.

In reference to the determination with -- Mr. Smith said the regulation at 222.163 -- it says, Determinations of proportionality must be made on a case by case basis for each LEA affected and not on the basis of a general rule to be applied throughout the state. So it is by a LEA -- for each LEA case by case.

JUDGE LEWIS: Okay.

MR. KOZELISKI: Thank you, Your Honor.

JUDGE LEWIS: Mr. Smith?

MR. SMITH: I have nothing further.

JUDGE LEWIS: Mr. Tarnow?

MR. TARNOW: Nothing, Your Honor.

JUDGE LEWIS: Anybody else have anything else to say?

(No response.)

JUDGE LEWIS: Okay. At this point then the parties will submit additional briefs on or before December 4. We will try to get the transcripts out to you as soon as we receive them. If there's nothing further then we will adjourn for the day.

Thank you, all.

(Whereupon, at 12 o'clock noon, the hearing in the above-entitled matter was concluded.)

## CERTIFICATE

| | |
|---|---|
| CASE NAME: | Zuni Public School District #89, et al. |
| DOCKET NUMBER: | 99-81-1 |
| LOCATION: | Albuquerque, New Mexico |
| DATE: | October 4, 2000 |

I do hereby certify that the foregoing pages, numbers 1 through 95, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Joe Gillis before the U.S. Department of Education Office of Hearings and Appeals.

10/14/2000

(Transcriber) (Date)

# EXHIBIT A
# JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

| | District | Revenue/ Member |
|---|---|---|
| 1 | Mosquero | $6,520.00 |
| 2 | Corona | $5,791.00 |
| 3 | Los Alamos | $5,611.00 |
| 4 | Vaughn | $4,641.00 |
| 5 | Hondo Valley | $3,690.00 |
| | 1st district ABOVE 95th Percentile<br>$3,650.40 = 95th Percentile | |
| 6 | Maxwell | $3,591.00 |
| 7 | Mora | $3,530.00 |
| 8 | Roy | $3,516.00 |
| 9 | Logan | $3,484.00 |
| 10 | Cuba | $3,404.00 |
| 11 | Silver City | $3,391.00 |
| 12 | Texico | $3,335.00 |
| 13 | Zuni | $3,320.00 |
| 14 | Springer | $3,295.00 |
| 15 | Jemez Valley | $3,286.00 |
| 16 | Ruidoso | $3,278.00 |
| 17 | Tatum | $3,266.00 |
| 18 | Penasco | $3,259.00 |
| 19 | Raton | $3,249.00 |
| 20 | Tularosa | $3,246.00 |
| 21 | Bernalillo | $3,244.00 |
| 22 | Las Vegas West | $3,241.00 |
| 23 | Mesa Vista | $3,233.00 |
| 24 | Hatch | $3,206.00 |
| 25 | Loving | $3,204.00 |
| 26 | Mountainair | $3,195.00 |

| | District | Revenue/ Member |
|---|---|---|
| 27 | Cobre | $3,194.00 |
| 28 | Melrose | $3,187.00 |
| 29 | Taos | $3,164.00 |
| 30 | Pojoaque | $3,155.00 |
| 31 | Wagon Mound | $3,154.00 |
| 32 | Carlsbad | $3,152.00 |
| 33 | Clayton | $3,151.00 |
| 34 | Espanola | $3,147.00 |
| 35 | Jemez Mountain | $3,123.00 |
| 36 | Las Vegas City | $3,122.00 |
| 37 | Ft. Sumner | $3,100.00 |
| 38 | Magdalena | $3,092.00 |
| 39 | Jal | $3,091.00 |
| 40 | Cimarron | $3,088.00 |
| 41 | Reserve | $3,087.00 |
| 42 | Lordsburg | $3,074.00 |
| 43 | Albuquerque | $3,071.00 |
| 44 | Chama | $3,065.00 |
| 45 | San Jon | $3,059.00 |
| 46 | Questa | $3,054.00 |
| 47 | Santa Fe | $3,050.00 |
| 48 | Grants | $3,035.00 |
| 49 | Pecos | $3,033.00 |
| 50 | Central | $3,027.00 |
| 51 | Santa Rosa | $3,011.00 |
| 52 | Elida | $3,006.00 |
| 53 | Estancia | $3,002.00 |
| 54 | Dora | $2,996.00 |
| 55 | Roswell | $2,992.00 |
| 56 | Clovis | $2,983.00 |
| 57 | Alamogordo | $2,982.00 |
| 58 | Tucumcari | $2,975.00 |
| 59 | Animas | $2,975.00 |

| | District | Revenue/ Member |
|---|---|---|
| 60 | Portales | $2,975.00 |
| 61 | Las Cruces | $2,974.00 |
| 62 | Socorro | $2,968.00 |
| 63 | Bloomfield | $2,968.00 |
| 64 | Artesia | $2,964.00 |
| 65 | Lovington | $2,963.00 |
| 66 | Capitan | $2,962.00 |
| 67 | Rio Rancho | $2,959.00 |
| 68 | Belen | $2,948.00 |
| 69 | Farmington | $2,948.00 |
| 70 | Truth or Cons. | $2,945.00 |
| 71 | Aztec | $2,942.00 |
| 72 | House | $2,936.00 |
| 73 | Grady | $2,915.00 |
| 74 | Deming | $2,912.00 |
| 75 | Los Lunas | $2,887.00 |
| 76 | Cloudcroft | $2,884.00 |
| 77 | Dexter | $2,883.00 |
| 78 | Carrizozo | $2,880.00 |
| 79 | Moriarty | $2,870.00 |
| 80 | Gallup | $2,861.00 |
| 81 | Quemado | $2,858.00 |
| 82 | Eunice | $2,849.00 |
| 83 | Hobbs | $2,848.00 |
| 84 | Gadsden | $2,829.99 |
| | $2,803.80 = 5th Percentile<br>1st district below 5th Percentile | |
| 85 | Lake Arturn | $2,787.00 |
| 86 | Dulce | $2,783.00 |
| 87 | Hagerman | $2,777.00 |
| 88 | Floyd | $2,725.00 |
| 89 | Des Moines | $2,672.00 |

| District | Revenue/ Member |
|---|---|
| Total | $284,095.00 |
| Mean | $3,192.08 |
| Median | $3,059.00 |
| 95th Percentile | $3,650.40 |
| 5th Percentile | $2,803.80 |

NEW MEXICO STATE
DEPARTMENT OF EDUCATION

IMPACT AID DISPARITY FOR 1999-2000
Based on Actual Revenue for 1997-1998

| DIST | REV/ MEM. | TOTAL MEM. | CUM MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Mosquero | $6,520 | 57.00 | 57.0 | |
| Corona | $5,791 | 81.00 | 138.0 | |
| Los Alamos | $5,611 | 3509.50 | 3647.5 | |
| Vaughn | $4,641 | 111.50 | 3759.0 | |
| Hondo Valley | $3,690 | 157.50 | 3916.5 | |
| Maxwell | $3,591 | 152.00 | 4068.5 | |
| Mora | $3,530 | 707.50 | 4776.0 | |
| Roy | $3,516 | 113.00 | 4889.0 | |
| Logan | $3,484 | 278.00 | 5167.0 | |
| Cuba | $3,404 | 773.00 | 5940.0 | |
| Silver City | $3,391 | 3837.50 | 9777.5 | |
| Texico | $3,335 | 498.00 | 10275.5 | |
| Zuni | $3,320 | 1696.00 | 11971.5 | |
| Springer | $3,295 | 285.50 | 12257.0 | |
| Jemez Valley | $3,286 | 513.50 | 12770.5 | |
| Ruidoso | $3,278 | 2408.00 | 15178.5 | |
| Tatum | $3,266 | 369.00 | 15547.5 | |
| Penasco | $3,259 | 709.50 | 16257.0 | $3,259 |
| Raton | $3,249 | 1479.50 | | |
| Tularosa | $3,246 | 1140.50 | | |
| Bernalillo | $3,244 | 3528.50 | | |
| Las Vegas West | $3,241 | 2130.50 | | |
| Mesa Vista | $3,233 | 572.00 | | |
| Hatch | $3,206 | 1410.50 | | |
| Loving | $3,204 | 556.50 | | |

JA 90

| DIST | REV/ MEM. | TOTAL MEM. | CUM MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Mountainair | $3,195 | 365.00 | | |
| Cobre | $3,194 | 2067.00 | | |
| Melrose | $3,187 | 287.50 | | |
| Taos | $3,164 | 3326.50 | | |
| Pojoaque | $3,155 | 1937.50 | | |
| Wagon Mound | $3,154 | 185.50 | | |
| Carlsbad | $3,152 | 6690.00 | | |
| Clayton | $3,151 | 732.50 | | |
| Espanola | $3,147 | 4920.50 | | |
| Jemez Mountain | $3,123 | 415.50 | | |
| Las Vegas City | $3,122 | 2623.50 | | |
| Ft. Sumner | $3,100 | 428.00 | | |
| Magdalena | $3,092 | 377.50 | | |
| Jal | $3,091 | 534.00 | | |
| Cimarron | $3,088 | 666.50 | | |
| Reserve | $3,087 | 270.00 | | |
| Lordsburg | $3,074 | 860.50 | | |
| Albuquerque | $3,071 | 83709.50 | | |
| Chama | $3,065 | 620.00 | | |
| San Jon | $3,059 | 217.50 | | |
| Questa | $3,054 | 638.50 | | |
| Santa Fe | $30,501 | 13044.00 | | |
| Grants | $3,035 | 3699.00 | | |
| Pecos | $3,033 | 878.50 | | |
| Central | $3,027 | 1314.00 | | |
| Santa Rosa | $3,011 | 860.00 | | |
| Elida | $3,006 | 127.00 | | |
| Estancia | $3,002 | 950.00 | | |
| Dora | $2,996 | 254.00 | | |

| DIST | REV/ MEM. | TOTAL MEM. | CUM MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Roswell | $2,992 | 10528.50 | | |
| Clovis | $2,983 | 8639.50 | | |
| Alamogordo | $2,982 | 7824.50 | | |
| Tucumcari | $2,975 | 1526.50 | | |
| Animas | $2,975 | 580.50 | | |
| Portales | $2,975 | 2806.50 | | |
| Las Cruces | $2,974 | 21365.50 | | |
| Socorro | $2,968 | 2204.50 | | |
| Bloomfield | $2,968 | 3358.50 | | |
| Artesia | $2,964 | 3861.00 | | |
| Lovington | $2,963 | 2909.00 | | |
| Capitan | $2,962 | 622.50 | | |
| Rio Rancho | $2,959 | 8590.50 | | |
| Belen | $2,948 | 4732.50 | | |
| Farmington | $2,948 | 10153.00 | | |
| Truth or Cons. | $2,945 | 1771.00 | | |
| Aztec | $2,942 | 3283.50 | | |
| House | $2,936 | 119.00 | | |
| Grady | $2,915 | 159.50 | | |
| Deming | $2,912 | 5326.00 | | |
| Los Lunas | $2,887 | 7946.50 | | |
| Cloudcroft | $2,884 | 545.00 | | |
| Dexter | $2,883 | 1161.50 | | |
| Carrizozo | $2,880 | 222.50 | | |
| Moriarty | $2,870 | 4643.50 | | |
| Gallup | $2,861 | 13815.00 | | |
| Quemado | $2,858 | 214.50 | | |
| Eunice | $2,849 | 780.00 | | |
| Hobbs | $2,848 | 8114.50 | 22012.0 | $2,848 |
| Gadsen | $2,829 | 12000.50 | 13897.5 | |

| DIST | REV/ MEM. | TOTAL MEM. | CUM MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Lake Arthur | $2,787 | 245.50 | 1897.0 | |
| Dulce | $2,783 | 718.00 | 1651.5 | |
| Hagerman | $2,777 | 475.50 | 933.5 | |
| Floyd | $2,725 | 261.50 | 458.0 | |
| Des Moines | $2,672 | 196.50 | 196.5 | |
| TOTAL: | | 317777.00 | | $411 |

5% OF MEM 15,888.85 DISPARITY 14.43%

# TITLE 5--GOVERNMENT ORGANIZATION AND EMPLOYEES
## PART I--THE AGENCIES GENERALLY
## CHAPTER 5--ADMINISTRATIVE PROCEDURE
## SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

**Sec. 553. Rule making**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons

therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)